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COAL PIPELINE ACT OF 1983

JUNE 14, 1983.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HOWARD, from the Committee on Public Works and Transportation, submitted the following

REPORT

together with

ADDITIONAL, DISSENTING AND ADDITIONAL DISSENTING VIEWS

[To accompany H.R. 1010 which on April 15, 1983, was referred to the Committee on Interior and Insular Affairs, and concurrently to the Committee on Public Works and Transportation for a period ending not later than thirty calendar days following the date on which the Committee on Interior and Insular Affairs files its report in the House]

[Including cost estimate of the Congressional Budget Office]

The Committee on Public Works and Transportation, to whom was referred the bill (H.R. 1010) to amend the Mineral Leasing Act of 1920 with respect to the movement of coal, including the movement of coal over public lands, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

The amendment to the text of the bill is a complete substitute therefore and appears in boldface roman type in the reported bill.

The title of the bill is amended to reflect the amendment to the text of the bill.

GENERAL STATEMENT

H.R. 1010 examines an issue which has been considered by the Committee in the past; that is, whether coal slurry pipelines should be allowed to utilize the Federal power of eminent domain to

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secure rights of way. This is the fourth consecutive Congress in which that question has been answered by the Committee in the affirmative.

Coal, when ground or mixed with water in equal proportions, can be transported through a pipeline at a velocity of about six feet per second. At the end of the pipeline, the material is removed from the pipeline and stored in tanks or ponds. It is then transferred to a dewatering facility, dried, stored, and shipped by other modes to a final destination, or burned directly for thermal electric generation. Research is being conducted on using materials other than water as a transport medium for mixture with the coal.

There is presently one coal slurry pipeline in operation in the United States. The Black Mesa Pipeline, owned by the Southern Pacific Company, runs 273 miles from the Black Mesa Mine on Navajo land in northeastern Arizona, to the Mojave Power Plant in southern Nevada. It was constructed when its owners felt that a pipeline would be the most economically feasible method of transporting coal from the mine to the power plant. Its capacity is 4.8 million tons of coal per year.

An earlier coal slurry pipeline which operated between Cadiz, Ohio, and a power plant 108 miles north on Lake Erie, east of Cleveland, was closed when the Pennsylvania Railroad introduced unit coal trains into the market. Because the unit train could move coal more economically than coal slurry pipelines, the pipeline ceased operations. The following illustration shows pipelines in existence, and those which have been proposed:

U.S. COAL SLURRY PIPELINE SYSTEM

Pipeline System	Length (Miles)	Annual Capacity (Tons)
1. Black Mesa	273	4,800,000
2. Allen-Warner Valley	183	11,600,000
3. Pacific Bulk	650	10,000,000
4. NICES*	1,100	25,000,000
5. San Marco	900	10,000,000
6. Texas Eastern	1,260	22,000,000
7. ETSI	1,387	25,000,000
8. Coalstream	1,500	25-55,000,000
9. Transco/VEPCO	400	15,000,000
10. Ohio	108	1,300,000
11. Powder River	1,300	25-36,000,000

*Northwest Integrated Coal Energy System

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The Committee faced several significant questions when it began its deliberation of H.R. 1010. The first, and most basic, was whether the need for coal slurry pipelines justified the delegation of the Federal power of eminent domain. Because the Committee found that the introduction of potential competition for the transportation of coal, in the form of slurry pipelines, could induce new marketplace pressures to constrain coal transportation rates, it was concluded that there was an overriding public interest in making the power of eminent domain available for the potential development of coal slurry pipelines, a potential that could not be realized fully absent the Federal power of eminent domain.

A second major question the Committee faced was the determination of the most appropriate agency for issuing those certificates that would allow the certificate holder to go to court to exercise the Federal power of eminent domain. The Committee found that, because the Interstate Commerce Commission (Commission) possessed a far-ranging expertise in transportation matters generally, and most particularly in those concerning the economic regulation of carriers involved in surface transportation that it could most appropriately serve as the certificating agency. As the principal regulator of the pipelines' chief competitor, the railroads, the Commission is already familiar with issues relating to coal transportation, and it understands the economics of the industry and regulatory environment in which such transportation will exist.

Another question was whether or not coal pipelines should be given explicit authority to enter into contracts for their transportation services. The bill as reported by the Committee establishes that coal pipelines may enter into contracts for their transportation services and establishes statutory guidelines for those contracts. Other transporters of coal may enter into contracts for their transportation services; hence, conferring upon the pipelines the same ability permits the pipelines to compete with other modes in a similar manner. Moreover, the authority removes any statutory cloud with respect to the pipelines' ability to enter into such contracts, and clarifies the manner in which they may be entered into.

Having resolved this question, the Committee was faced with the question as to how to impose an obligation upon the pipelines to provide service where the pipeline elects to provide service pursuant to contracts. The Committee answered the question by adopting a mechanism that imposes certain types of service obligations which are enforceable for original supporters, a term defined in section 10960 and for other shippers. Under that mechanism, the original supporters and other shippers can force the pipeline to provide service. Here, it should be noted that pipelines not electing to provide contract service are subject to existing law; that is, they would be subject to the rate and services provision in Title 49 of the United States Code that now apply to pipelines.

Because the Committee is concerned with the impact that a certificated coal slurry pipeline might have upon other modes that rely on the transportation of coal for their economic success or survival, a regulatory framework was established allowing the Commission to consider this impact, on a case-by-case basis, before issuing a certificate. Thus, the Commission has the authority to consid-

er the effects the issuance of a certificate will have on the overall economic health of a competitive carrier.

The final major question addressed by the Committee was how coal slurry pipelines could be constructed without affecting the authority of the states to regulate water. The bill retains the authority of the states to regulate their water resources. This intent is established by the provisions in sections 2, 5 and 10.

Section 2 of the bill sets forth the Congressional findings and the purpose of the bill. Those findings and purpose clearly show that the intent of the bill is to facilitate construction of coal slurry pipelines, but that the overriding intent is that any water used be acquired in accordance with state law and interstate allocations, whether those allocations be made by Interstate Compacts, or by legislative or judicial allocation.

Two new subsections established in Title 49, United States Code by section 5 of the bill directly relate to water. New subsection 10951(b) states:

> Nothing in this subchapter shall be construed to permit any person (including the Commission, any other official or employee of the United States, or any coal pipeline carrier) to acquire any right to take, use, or develop water through exercise of the power of eminent domain under this section

The net effect is that eminent domain cannot be utilized to acquire any interest in or to acquire any use of water.

New subsection 10952(a)(2) states:

> No person may apply for a certificate of public convenience and necessity to construct, operate, maintain, extend, or increase the capacity of, a coal pipeline under this section unless such person first files for and secures under applicable State water law approval of a water permit, or acquires other appropriate authorization for reservation, appropriation, purchase, transfer, use, diversion, or export of water, necessary to operate such pipeline or extension.

Again, this subsection plainly indicates that the state law is to control the water issue.

Section 10 of the bill provides additional language which is intended to preserve state water law, while at the same time permitting the state to condition or ban use of water for coal slurry pipelines. This section of the bill was debated at great length by the Committee. Plainly, the intent and application of section 10 is of critical importance to the Committee. Development of coal slurry pipelines will require use of water resources and interstate coal pipelines will, almost certainly, require some interstate transfers of water.

Congressional concern about the ability of the states to control in state law interstate transfers of water was intensified as a result of the Supreme Court's decision in *Sporhase* v. *Nebraska,* 458 U.S. 273 (1982). The *Sporhase* decision involved a Nebraska state law which as pertinent provided:

> Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from

> any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska. Sec. 46–613.01 of the Nebraska Revised Statutes.

The State prevailed in the Nebraska Supreme Court. The decision was appealed to the United States Supreme Court. In reaching its decision, the Supreme Court began by stating that water is an article of commerce and therefore subject to the Commerce Clause. It then reviewed the Nebraska law in the context of the traditional Commerce Clause analysis.

The Court called Nebraska's interest in conserving and preserving diminishing sources of ground water "unquestionably legitimate and highly important." The Court reiterated its view that the interests of the Western States in their water convincingly demonstrate the desirability of State and local management of ground water and the concomitant Federal deference to State water law.

Thus, the requirements in the Nebraska law "that the withdrawal of ground water is reasonable, is not contrary to the conservation and use of ground water, and is not detrimental to the public welfare" are legitimate interests and justify the disparate treatment of requests to export water. (No permit is required if the water is to be used in Nebraska.)

However, in the decision the Court found that Nebraska did not attempt to prove that the reciprocity requirement contained in its statute furthered its conservation and preservation interest, and the Court struck that requirement down as an impermissible burden on interstate commerce.

The Court also addressed the power of Congress to authorize States to pass laws regulating interstate commerce which, absent the Congressional authorization, would impermissibly burden commerce in violation of the Commerce Clause. As an example, it cites the Reclamation Act of 1902 in which Congress directed the Secretary of the Interior to proceed in conformity with State law on questions of water rights involved in Federal water projects. In this case *Sporhase*), however, the Court concluded that the Congress has not expressed its intent to defer to State law regarding the export of water to nonreciprocating States. Congress' "intent and policy to sustain State legislation from attack under the Commerce Clause" must be "expressly stated," according to the Court.

It was with this background that the Committee adopted the water language in section 10. Plainly, the Committee's decision is that the states should have complete control over any form of acquisition or use of water for coal pipelines, subject to certain limited restrictions that are set forth in subsection 10(c).

Section 10(a) specifies that state law will control both the substances and procedure for the acquisition and use of water within a state for coal pipelines, without regard to the source of the claimed

right to water. Hence, any claim to water for a coal slurry pipeline arising from either Federal or state law should be treated as if it arose solely under state law. Thus, any attempt to exercise a claim to water for a coal slurry pipeline stemming from a Federal right must be pursued in accordance with state law.

Section 10(b) provides that the Congress delegates to the States the power to establish and exercise terms and conditions, including terms and conditions denying or prohibiting acquisition or use of water for coal pipelines, notwithstanding any otherwise impermissible burden which those terms and conditions may impose on interstate commerce. This delegation is to be construed in light of the Supreme Court's decision in the *Sporhase* case. It is expressly made so as to satisfy the Court's admonition that such delegations be "expressly stated."

The intent is to prevent a ruling like that in the *Sporhase* decision and to sustain State legislation from attack under the Commerce Clause where a state imposes terms and conditions on its allocation of water or use of water for coal pipelines. The delegated power is the power to limit or bar water from being acquired or used for a coal slurry pipeline. Thus, a state could have a statute like the Nebraska statute pertaining to water for coal pipelines and that statute would be free from challenge under the Commerce Clause. Moreover, a State could have a statute which imposes different or additional conditions on the use or export of water for coal pipelines.

The first sentence of subsection 10(c) provides for the continued validity of State laws and interstate compacts. In addition, States can exercise control over Federal rights to water for coal pipelines purusant to state law and impose terms and conditions as provided in the delegation set forth in subsections (a) and (b).

This section does not impair the validity of or preempt any interstate compact governing water. It does not grant states the power to unilaterally alter the provisions of any agreement binding on more than one state, or on the United States. Instead, the statute grants only the power to control the use of water allocated to a given state to the extent that its use is not limited by existing or future interstate or international agreements. This is apparent from the fact that the statute does not delegate to any state any power under, for example, the Compact or Treaty Clauses of the Constitution.[1] The statute grants no new powers other than the Commerce Clause authority specifically delegated by subsection (b), and further limited by subsection (c), of Section 10. Plainly, the intent of Congress is to make a limited delegation of power to the States for a specific purpose, not to grant states the full power of Congress under the Constitution generally. This is clear on the face of the statute.

The second sentence of subsection 10(c) is a "hold harmless" provision. It means that a state is given no additional interest by this legislation in any interstate or shared body of water. The provisions of section 10 do not create any new interest in interstate

[1] No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . ." (Art. I, Section 10); "He (the President) shall have Power . . . to make Treaties . . ." (Art. II, Section 2).

water, nor do they alter the traditional rules for judicial or legislative allocation of interstate water. Nor does section 10 alter the provisions of any interstate compact or allocation, or require the states to enter into or develop interstate compacts or allocations. The plain intent is that the states will continue to have whatever interest in interstate waters that they had before enactment of this legislation. States are free to make arrangements for allocation and use of interstate waters by the appropriate method and in the appropriate forum. Thus, states are free to enter into interstate compacts concerning interstate water. Interstate water compacts already in effect should continue to remain in effect. The same rationale applies to any existing or future legislative or judicial allocation.

The fourth sentence in subsection 10(c) provides that nothing in this Act shall affect the right of any Indian or Indian tribe. Thus, whatever rights existed before the legislation was enacted will continue to exist after the legislation is enacted. Nothing in the legislation affects any governmental or regulatory authority of any Indian or Indian tribe.

The last sentence of section 10(c) is specifically intended to resolve any conflicts between the provisions of section 10 of this Act and the provisions of another Act or other Federal law. It is designed to prevent a decision like that in *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152 (1946) in the context of coal pipelines. This language plus the language in section 2 shows the intent that the best resolution of the potential conflict between water allocation and coal pipelines is to allow the states to prohibit such pipelines for reasons of water allocation, if a state or states so choose; thus, the State interest should prevail despite the national interest in facilitating the construction of coal pipelines. The intent is reemphasized by the provisions in section 5 dealing with eminent domain and the need for having a state water permit or authorization prior to applying for a certificate to construct, operate, and maintain a coal pipeline.

Subsection (d) is simply a clarifying amendment. This clarifies that the legislation does not preempt Federal law or State law relating to water quality and disposal. This amendment was added to the bill because the Department of Justice believed that it helped to clarify Congressional intent.

The National Wildlife Federation sought an amendment to assure that Federal water rights were protected. As pertinent, the only Federal right affected by this legislation is the limitation on the use of Federal power by anyone seeking to acquire water that is to be used for coal pipelines, no other Federal rights are affected. Section 10 fully addresses the problem, consequently, an amendment of this nature is unnecessary.

Finally, the bill as reported contains three provisions that warrant special comment. All three of them are in section 5 of the bill.

The first appears in new subsection 10952(b)(4)(C). Essentially, it provides that in making a determination of whether or not issuance of a certificate is required by the public convenience and necessity, the Commission is required to consider the past record, written plan, and sufficiency of assurances that the applicant will make maximum use of minority employees and minority-owned en-

terprises in the construction, operation, and maintenance of coal pipelines.

The Committee notes that the Bureau of the Census does not have an official definition for minority groups and that the definition used by Federal agencies tends to vary according to the legislation or the regulations pertaining to the specific program. The Committee is aware of the Interstate Commerce Commission's policy statement set forth in Ex Parte No. MC–150, Minority Participation in the Motor Carrier Industry, January 8, 1981, and the provision in section 10101(a)(7)(g) of the National Transportation Policy (49 U.S.C. 10101(a)(7)(g)). It should be noted that the policy is related solely to the motor carrier industry.

The purpose of this new provision is to provide guidance similar to the policy already promulgated by the Commission in order to foster participation by minority groups and minority-owned businesses in the pipeline projects seeking certification. The committee believes that there should be particular emphasis on minority groups that have high unemployment rates. This is in no way intended to preclude modification in the policy should the facts warrant.

With respect to a minority owned enterprise, the Committee means any business concern which is over 50 per centum owned by one or more individuals classified as a minority, or in the case of any publicly owned business, over 50 per centum of the stock is owned by one or more individuals classified as a minority, and whose management and daily business operations are controlled by one or more such individuals.

The second provision appears in new subsection 10958(a). The provision is contained in the second sentence of the subsection. Its purpose is to require an "as built" or post-construction survey of any constructed pipeline, or an extension thereof. It is intended that the survey should be conducted and filed in accordance with any applicable state law. If no state law exists, this requirement should not obstruct or delay the pipeline's construction. In any case, the survey should be consistent with professional surveying and engineering standards for such surveys and filed with the appropriate state or county office.

Vast numbers of public works structures have been built in recent years creating a maze of highways, pipelines, cables and other civil works which add to the inventory of publicly used structures. Because design changes made during construction are seldom recorded, the exact location of utilities, particularly those built underground, is often unknown. Furthermore, past experience shows these structures and their rights-of-way are often used as reference points for other dependent surveys. Finally, structures are sometimes built in other than the design location. In fact, a 1974 study by the American Public Works Association found that less than 25 percent of all municipal records on utility location are complete and up-to-date.

Experience with some gas pipelines has shown that a lack of knowledge of their exact location has resulted in inadvertent drilling, excavation and other activities which have resulted in ruptures causing loss of life, property damage and disruption of service in the pipeline.

This provision requires an "as built" survey to establish an accurate record of constructed coal slurry pipelines. The purpose of the survey is to determine the horizontal and vertical position of the structure. These surveys, in order to be accurate and cost-effective, should be conducted prior to back filling of trenches, and referred and tied to any existing local State Plane Coordinate System.

The completion of "as-built" surveys will assure proper location and identification of coal slurry pipelines subsequent to their construction. This will not add significant costs to the pipeline's construction, yet they will add immeasureable benefit to the public through increased safety and provide a means of minimizing any disruption in the service of the pipeline.

The Third provision appears in new subsection 10958(b). That provision requires that upon completion of the pipeline, a pipeline has a duty to replace the topsoil and to provide for revegetation, restoration and curtailment of erosion. The intent is to restore the land disturbed by the construction to its prior condition to the maximum extent feasible. In addition, the pipeline has a duty to use or allow use of the right-of-way land wherever possible, for the purpose for which it was used before construction.

The Committee notes that when the United States Government utilizes the power of eminent domain, it generally attempts to condemn only that interest in the property which is required. Consequently, the interest condemned in the majority of the condemnations is not fee simple, but a mere easement carrying with it the right to use the property for the needed purpose only. The Committee anticipates and intends that the same policy will be carried out in the implementation of this Act. Landowners are given the right to negotiate with the pipelines prior to any condemnation proceeding, and certainly, they can if they choose elect to sell a fee simple interest.

The Committee intends that the lands disturbed by the construction of lands for coal pipelines be restored as nearly as possible to their original condition and use. It is assumed that the courts would impose the same requirements, however, the amendment was added so as to remove any doubt that the Committee intended that those requirements be imposed. Thus, subject to the limitations expressed in subsection 10958(b), if land was used for agricultural purposes prior to condemnation, it should be restored to that purpose and it should be used for that purpose after construction of the pipeline is completed.

SUMMARY

The following is a brief summary, in outline form, of the major provisions of H.R. 1010, as reported by this Committee.

I. BASIC PURPOSE

The purpose of the legislation is to facilitate the construction of coal pipelines by granting the Federal power of eminent domain to those coal pipelines that are determined to be required by the public convenience and necessity, except that, the development of pipelines may occur only if now or hereafter permitted by State water laws and interstate allocations.

II. CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND THE EXERCISE OF FEDERAL EMINENT DOMAIN POWER

A. *Application Process.*—A coal pipeline carrier which desires to avail itself of Federal eminent domain power must apply to the Interstate Commerce Commission for a certificate of public convenience and necessity.

1. Prior to filing an application with the Commission, the applicant must (a) publish (for a period of at least four weeks) notice of its intention to file an application in a newspaper of general circulation in each county in which the pipeline will be located, (b) send a copy of the notice to the Commission and chief executive officer of each State, (c) notify interested coal producers and coal users, and (d) offer to make available to small and independent coal producers a specified minimum portion of the pipeline.

2. A period of at least 90 days must elapse between the final publication of notice and the filing of the application; during this period interested coal shippers would be able to contact the applicant and the Commission.

3. The notice provision and the 90-day waiting period described above are extremely important. As will be discussed later, any shipper of coal which notifies the Commission and the applicant during the waiting period of its interest in shipping coal and which subsequently supports the application during the certification process, will have a right to have its coal shipped under terms and conditions similar to those being accorded other shippers.

4. An application for a certificate must be under oath, contain such information as the Commission requires, and be served on the chief executive officer of the involved states. Notice of the application must be filed in the Federal Register.

5. Within 10 days of the application being filed, the Commission must notify the Attorney General, who must subject each application to antitrust review. The review and resulting findings must be completed within 120 days. No application may be approved if the Attorney General advises the Commission in writing that on the basis of such review, approval of the application is not consistent with the antitrust laws.

6. The legislation calls for expedited hearings and procedures with a target date of 18 months for processing applications.

7. No application may be approved unless an environmental impact statement is prepared with respect to such application under section 102(2)(c) of the National Environmental Policy Act of 1969.

8. No person may apply for a certificate unless such person first files for and secures under state law approval of a water permit or other appropriate state authorization.

B. *Issuance of a Certificate.*—The Commission has the discretionary authority to issue or not issue a certificate of public convenience and necessity for any particular pipeline project.

1. The Commission shall issue a certificate if it determines that the applicant is fit, willing and able, and the coal slurry

pipeline is or will be required by the present or future public convenience and necessity.

2. The Commission may approve the application as filed or with modifications (including establishing a capacity for the pipeline which is greater or less than the capacity proposed in the application).

3. The Commission shall deny the application if it fails to find the applicant fit, willing, or able, or to find public convenience and necessity.

4. In making a determination of public convenience and necessity, the Commission must at least consider (a) evidence of public support (b) the effect on existing carriers (railroads); diversion of revenue or traffic, however, is not in and of itself sufficient to defeat an application, and (c) the past record, written plan, and sufficiency of assurances that the applicant will make maximum use of minority employees and minority-owned enterprises in the construction, operation, maintenance, extension, or increase in the capacity of the coal pipeline.

5. The Commission cannot issue a certificate if the Attorney General determines that the proposed pipeline operation will be inconsistent with the antitrust laws.

6. Any certificate issued shall describe the construction, operation, maintenance, extension, or increase in capacity authorized by the Commission. It shall also set forth the route and capacity of the pipeline. Finally, it shall include any terms and conditions the Commission determines are necessary to protect the public interest and to satisfy the demand for transportation by small and independent coal producers.

C. *Scope of Eminent Domain Authority.*—The legislation would allow any coal slurry pipeline which has obtained a certificate of public convenience and necessity to exercise the Federal power of eminent domain.

1. Suits to enforce the power must, with certain exceptions, be instituted in the appropriate state court.

2. This law applies to such suits, but state practice and procedure should be followed.

3. Federal courts may be used if the landowner so elects, or if the state court does not provide for an eminent domain action.

4. State law controls on compensation, trial by jury, and siting alternatives except where the effect of the state law would prohibit an acquisition of a right-of-way and would not allow a reasonable alternative acquisition. Landowners are guaranteed trial by jury.

5. The power cannot be used to acquire any right to take, use, or develop water.

6. A prior negotiation requirement is imposed.

7. Attorneys' fees are provided for landowners in certain circumstances.

D. *Contracts.*—The legislation would allow certificated coal pipeline carriers to enter into contracts with the shippers of coal for transportation services under specified rates and conditions.

1. Prior to issuance of the certificate, a coal slurry pipeline carrier must notify the Commission if it wants to enter into contracts for all or any part of its capacity.

2. The contracts must be filed with the Commission and they are subject to its approval. The Commission, on its own initiative or on complaint, may institute a proceeding to review the contract.

3. The Commission may not approve a contract if it (a) would result in the capacity of the pipeline being exceeded, (b) would constitute a destructive competitive practice, or (c) would violate any of the terms and conditions in the certificate.

4. Rate provision Chapter 107 of subtitle IV of Title 49, U.S.C., do not apply to coal slurry pipeline contracts after such contracts are approved by the Commission.

5. Coal pipelines providing transportation under a contract approved by the Commission are not considered to be common carriers while providing such transportation.

6. Modifications of contracts must be approved by the Commission.

E. *Common Carrier Obligation.*—A certificated coal pipeline company which has elected to enter into contracts for all or any part of its capacity has duty to provide transportation services for certain shippers of coal under certain circumstances.

1. The duty arises with respect to three classes of shippers.

2. The first class, known as "original supporters," are shippers who have notified the Commission and the applicant (during the 90-day waiting period prior to the filing of the application) of their interest in shipping coal and who have supported the application through the certification process.

3. A certificated coal slurry pipeline which has elected to enter into contracts must provide each original supporter transportation of that volume of coal which the original supporter requested in the certification proceeding and for which a need is shown. If the capacity approved by the Commission is not sufficient to handle the total volume which all of the original supporters wish to ship, then the pipeline must provide each original supporter its equitable share of the capacity (as determined by the Commission).

4. The coal pipeline is given a one-year period (which the Commission can extend to two years) after the certificate is issued to enter into contracts with the original supporters.

5. An original supporter who was ready, willing, and able to enter into a contract with the coal slurry pipeline but was unable to agree on terms, may file a complaint with the Commission within 150 days of the expiration of the one-year period (or a longer period of up to two years if ordered by the Commission) in order to enforce its rights as an original supporter. The Commission may order the pipeline to provide the transportation under terms and conditions similar to those being offered other shippers.

6. An original supporter can waive its rights or voluntarily agree to different terms and conditions.

7. The Commission may not approve any other contracts unless it is satisfied that the coal slurry pipeline can meet the requirements of the original supporters.

8. The duty with respect to the second class of shippers arises when the coal slurry pipeline has unobligated capacity.

9. More specifically, the duty arises at the time when the coal slurry pipeline enters into a contract with a shipper for part of any unobligated capacity. During the 60-day period (or longer period as established by the Commission) beginning on the date the contract is filed, the coal slurry pipeline must enter into similar contracts with other shippers of coal on a first-come, first-served basis (in the order in which written offers are submitted) until the capacity of the pipeline is totally obligated or the period ends, whichever occurs first.

10. The Commission, on the complaint of a shipper, may order a coal pipeline carrier to provide the requested transportation if it finds that the pipeline has not complied with this duty. Shippers have 30 days in which to file a complaint with the Commission (following expiration of the 60-day period).

11. The third class is small and independent coal producers for which the Commission has ordered service as a term or condition of the certificate.

F. *Miscellaneous Terms and Conditions.*—The applicants and pipelines receiving certificates are subject to certain requirements.

1. Applicants must reimburse the Commission for the costs of processing the application and other associated costs.

2. A certificated coal pipeline carrier must comply with any terms and conditions which the Commission includes in its certificate

3. A certificated coal pipeline carrier which wants to extend the pipeline or increase its capacity must apply to the Commission for a certificate of public convenience and necessity, unless the requirement is waived by the Commission.

4. Certificated coal pipelines, to the maximum extent practicable, shall be buried underground.

5. All materials used in the construction and maintenance of certificated coal pipeline must be "manufactured in the United States from articles, materials and supplies mined, produced or manufactured, as the case may be, in the United States." The Commission has the authority to exempt a coal pipeline carrier from this requirement in certain situations.

III. RIGHTS-OF-WAY ACROSS FEDERAL LANDS

A. The provisions in the legislation relating to rights-of-way across Federal lands are substantially similar to the provisions in the Interior Committee's version.

B. The provisions basically set forth the requirements for obtaining rights-of-way across Federal lands.

C. The legislation also includes provisions relating to existing rights-of-way and pending proceedings.

D. The new rights-of-way provisions in the legislation pertain only to certificated pipelines.

IV. STATE WATER LAWS

(A) The United States or any other person or entity must utilize state substantive and procedural law in order to reserve, appropriate, use, divert, dedicate, export, or otherwise claim or exercise any interest in, water within any State for a coal pipeline.

(B) States are delegated the powers to establish and exercise in state law terms and conditions for the reservation, appropriation, export, and other interest in and use of water for a coal pipeline, notwithstanding any otherwise impermissible burdens on interstate commerce.

(C) Other provisions provide for the continued validity of state water law and compacts.

(D) The legislation does not alter the right of a state to its apportioned share of water, whether determined by interstate compacts, or by legislative or judicial allocation.

V. PROVISIONS RELATING TO NONCERTIFICATED PIPELINES

Certain provisions in the legislation would apply to noncertificated coal pipelines as well as certificated pipelines.

A. The legislation does not require coal pipelines to obtain a certificate of public convenience and necessity. The only pipeline carriers which must be certificated are those that desire to exercise the Federal right of eminent domain.

B. The legislation would allow noncertificated coal pipelines to enter into contracts with shippers of coal for transportation services under specified terms and conditions.

1. The pipeline must elect to enter into contracts for all or any part of its capacity and so notify the Commission in writing.

2. The contracts must be filed with the Commission and are subject to Commission approval. The Commission, on its own initiative or on complaint, may institute a proceeding to review the contract.

3. The Commission may not approve a contract if it (a) results in the capacity of the pipeline being exceeded or (b) constitutes a destructive competitive practice.

4. A noncertificated coal pipeline which elects to offer contracts has a duty with respect to certain coal shippers when the pipeline has unobligated capacity.

5. More specifically, the duty arises at the time when the coal pipeline enters into a contract with a shipper for part of the unobligated capacity. During the 60-day period (or longer period as established by the Commission) beginning on the date the contract is filed, the coal slurry pipeline must enter into similar contract with other shippers of coal on a first-come, first-served basis (in the order in which written offers are submitted) until the capacity of the pipeline is totally obligated or the period ends, whichever comes first.

6. The Commission, on the complaint of a shipper, may order a coal pipeline to provide the requested transportation if it finds that the pipeline carrier has not complied with this duty. Shippers have 30 days in which to file a complaint with the Commission (following expiration of the 60-day period).

7. The safety provisions contained in Section 11 of this legislation apply.

8. The water provisions contained in Section 10 of this legislation apply.

VI. COAL PIPELINES OPERATIONS

This legislation provides for the imposition of safety regulatory controls.

A. The legislation requires the Secretary of Transportation to promulgate regulations establishing uniform standards for coal pipeline facilities.

B. Some of these standards would not apply to existing pipelines, pipelines under construction, or pipelines for which a final Environmental Impact Statement has been issued.

C. The Secretary would be given authority to waive any standard if it is consistent with pipeline safety.

D. The Secretary's standards would preempt State standards for interstate coal pipelines. However, if State law imposes additional or more stringent standards than the Federal standards established under this section, and those standards do not discriminate against a pipeline or do not have the effect of prohibiting construction, operation or maintenance of the pipeline, then such State law shall apply.

E. In case of violations, the legislation provides for civil penalties of up to $5,000 per day and criminal penalties of up to $10,000, or imprisonment for not more than one year, or both.

F. These standards apply to both certificated and noncertificated pipelines.

VII. ENFORCEMENT AND PENALTIES

The legislation has enforcement provisions for the Secretary of Interior.

A. The legislation authorizes the Attorney General, at the request of the Secretary of the Interior, to enforce various provisions of the Act and any regulations or orders issued under the Act.

B. The civil and criminal penalties are similar to the penalties for violations of the Secretary of Transportation's safety standards.

Section-by-Section Analysis

Section 1. Short Title.—The short title is the "Coal Pipeline Act of 1983."

Section 2. Findings and Purpose.—Subsection (a) makes certain findings that relate to the use of coal. The findings are:

(1) the continuing dependence of the United States on foreign sources for petroleum and petroleum products entails grave national security risks, results in major balance-of-payment deficits, and causes increases in inflation and unemployment in the domestic economy;

(2) the United States possesses extensive coal reserves that must be produced, transported, and utilized to reduce the Nation's dependence on imported petroleum;

(3) domestic coal reserves cannot be developed and used for fuel unless adequate transportation systems and facilities exist for the efficient and economic transportation of coal to markets in interstate and foreign commerce at competitive prices across great distances;

(4) the Nation's coal transportation system should include coal pipelines that will assist the Nation to develop efficiently and use its coal resources;

(5) the construction of coal pipelines to transport domestic coal will be facilitated by granting the power of eminent domain to certain coal pipelines;

(6) the construction of coal pipelines is a beneficial public use that justifies granting the Federal power of eminent domain to those pipelines for which a finding of public convenience and necessity has been made pursuant to this Act;

(7) State water law and interstate allocations are carefully balanced and structured systems for the allocation of water;

(8) the need for coal pipelines is subservient to the national interest in the primacy of State water law and interstate allocations; and

(9) therefore, the national interest is best served by developing coal pipelines only if such development is now or hereafter permitted by those State water laws and interstate allocations, notwithstanding the otherwise impermissible burden which may thereby be imposed on interstate commerce.

(b) Subsection (b) sets forth the purpose of the bill. The purpose is to facilitate the development of coal pipelines by granting the Federal power of eminent domain to those coal pipelines that are determined to be required by the public convenience and necessity, except that Congress declares that the development of coal pipelines may occur only if now or hereafter permitted by State water law and interstate allocations and hereby delegates to and ratifies the exercise of such authority by the States as further set forth herein.

Section 3. DEFINITION.—This section contains definitions frequently used in this bill. They are as follows:

(1) The term "coal" means any of the recognized classifications of coal, including anthracite, bituminous, semibituminous, submituminous, and lignite.

(2) The term "coal pipeline" means any pipeline system for the transportation of coal (whether in a liquid or solid state and whether alone or mixed with other substances) which is or will be constructed (A) from a point in a State to a point in another State or (B) from a point in a State to another point in such State through another State. A coal pipeline includes the line pipe, valves, pumping stations, coal collection lines or systems, and similar equipment or facilities used or useful in the transportation of coal.

(3) The term "Federal lands" means lands owned by the United States other than lands which are—

(A) located on the Outer Continental Shelf (as defined in the Outer Continental Shelf Lands Act),

(B) designated as willderness,

(C) administered as part of the national park system,

(D) held in trust for an Indian or Indian tribe, or

(E) held in trust by, or under the control of, the Tennessee Valley Authority. The term "Federal lands" does not include any lands owned by an Indian or Indian tribe and subject to a restraint against alienation imposed by the United States.

(4) The term "antitrust laws" includes the Clayton Act (15 U.S.C. 12 et seq.), the Sherman Act (15 U.S.C. 1 et seq.), and the Wilson Tariff Act (15 U.S.C. 8 et seq.).

(5) The term "interstate allocation" means the allocation of water between States by interstate compact or legislative or judicial allocation.

(6) The term "right-of-way" includes an easement, lease, permit, or license to occupy, use, or traverse Federal lands.

(7) The term "State" means a State of the United States and the District of Columbia.

(8) The term "State law" includes all that body of constitutional or statutory law, judicial precedent, administrative regulation and administrative decision, whether now in existence or hereafter enacted, decided, or promulgated by a State or its properly constituted officials.

Section 4. ANTITRUST PROVISIONS.—This section states that nothing in this Act shall impair, amend, broaden, or modify the antitrust laws; however, note that the bill requires that the Attorney General conduct an antitrust review of applications for certificates.

Section 5. AMENDMENT TO INTERSTATE COMMERCE ACT.—(a) Chapter 109 of Title 49, is amended by adding the following new subchapter III which contains ten sections, numbered 10951 through 10960.

SECTION 10951. EMINENT DOMAIN

Subsection (a) provides that any person issued a certificate under section 10952 may utilize the Federal power of eminent domain to acquire rights-of-way over private lands. The power of eminent domain is to be exercised in the appropritate State court in such manner as may be provided for under applicable State law. The phrase "in such manner" means state practice and procedure. If for some reason, state law does not provide for such action, the action can be brought in a Federal district court. The subsection further provides that upon petition of the landowner, the action shall be removed to the appropriate United States district court.

State law dealing with compensation, trial by jury and siting alternatives will apply except if such law would prohibit acquisition of a right-of-way, and would not allow a reasonable siting alternative. If state law does not provide for or permit trials by jury, an affected landowner shall have the right to a trial by jury.

Subsection (b) provides that the delegated eminent domain power cannot be used to take, use, or develop water rights.

Subsection (c) provides that the power of eminent domain may be used to acquire rights-of-way through any land which is part of a historic site of national, State, or local significance, or any land designated as a wilderness or wildlife refuge in accordance with applicable law by the duly constituted authority unless there is no feasible and prudent alternative to such right-of-way and reasonable planning is made to minimize harm.

Subsection (d) provides that no person may exercise the power of eminent domain unless such person is unable to acquire the right-of-way by negotiation within a reasonable period of time.

Subsection (e) requires payment of reasonable attorney fees to a landowner involved in a condemnation suit where the offer for the land is not at least 80 percent of the value of the land as determined by the Court in the condemnation suit. The limit for the fees is $20,000, except that it can be higher if there is a showing of bad faith.

SECTION 10952. CERTIFICATE

Subsection (a)(1) provides that anyone seeking to construct, operate, maintain, or extend a pipeline may apply to the Commission for a certificate of public convenience and necessity to the Commission. Anyone seeking to extend or increase the capacity of a certificated pipeline must apply for a certificate to extend or increase the capacity of the pipeline.

Subsection (a)(2) requires that an applicant must have its state water permit prior to the time it files its application for a certificate.

Subsection (b)(1) provides that the Commission shall grant a certificate if it finds that the applicant for the certificate is fit, willing, and able to construct, operate, and maintain the pipeline and to comply with this subtitle and the Commission's regulations, and that the proposed operation is or will be required by the public convenience and necessity. In granting this certificate, the Commission may grant the application as filed or approve the application with modifications, including but not limited to establishing a capacity for the pipeline and any other condition the Commission deems necessary to protect the public interest. If the application is approved, the Commission shall require compliance with any terms and conditions it finds necessary to protect the public interest and to supply the demand of small and independent coal producers.

Subsection (b)(2) provides that the Commission shall deny the application if it fails to find the applicant fit, willing, and able or to find public convenience and necessity.

Subsection (b)(3) provides that if the Commission approves the application, it shall issue a certificate describing the construction, operation, maintenance, extension, or increase of capacity, specify the route of the pipeline, establish the capacity for the coal pipeline or extension, and include any terms and conditions it is attaching to the certificate.

Subsection (b)(4) requires that in making a determination of public convenience and necessity, the Commission shall at least consider evidence or pulic support and the effect the issuance of the certificate would have on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself contrary to public convenience and necessity. In addition, consideration must be given to the use, past and present, of minority employees and minority-owned enterprises by the applicant for the certificate.

Subsection (b)(5) provides that the term "fitness" includes financial fitness, operational fitness and safety fitness.

Subsection (b)(6) provides that in determining the capacity of a pipeline, the Commission must look at (1) any contract which is entered into or proposed on or before the date the application is filed; (2) any contracts which can be reasonably anticipated; and (3) other factors that may be relevant.

Subsection (b)(7) provides that the Commission may order a set-aside from small and independent producers, a new term added to the definitions in section 10960. The Commission may require that such transportation be provided upon reasonable request or pursuant to nondiscriminatory contracts or both.

Subsection (c) sets forth guidelines for the format of the application and for information that must be included in the pipeline application. Notice of the application must be published in the Federal Register.

Subsection (d)(1) requires that the applicant publish notice of its intent to file an application. In addition, it establishes the method of publication and the substance of the notice. An applicant is required to make certain offers to small and independent producers. If the applicant does not comply with the provisions of this subsection, the Commission may not approve an application.

Subsection (d)(2) provides that any shipper desiring to use the coal pipeline should notify the Commission of such interest and specify the volume of coal which such person is interested in having transported by such pipelines.

Subsection (d)(3) requires that within 180 days after the effective date of this section, the Commission shall issue regulations to carry out the objectives of this subsection.

Subsection (e)(1) provides for the inclusion of the Attorney General's input at all stages of the certification process and at all stages of development of rules and regulations applying to coal pipelines.

Subsection (e)(2) requires the Commission to notify the Attorney General of the filing of such application. The Attorney General shall conduct an antitrust review of the application prior to the issuance of any certificate. The purpose of the review is to determine the likely effects of the issuance of the certificate on competition. The Attorney General has 120 days to complete his investigation and advise the Commission. This advice can include findings and recommendations or conditions that the Attorney General deems necessary to be included in such certificate. The provision clarifies that the terms and conditions recommended by the Attorney General can pertain to use and ownership of the coal pipeline. No application can be issued if the Attorney General advises the Commission that the approval of the application is not consistent with the antitrust laws.

Subsection (e)(3) provides that any action by the Attorney General under this subsection does not confer any immunity to anyone or create a defense against violations of the antitrust laws.

Subsection (e)(4) provides that an antitrust review shall be deemed to be an "antitrust investigation" within the meaning of the Antitrust Civil Process Act (15 U.S.C. 1311, et seq.).

Subsection (f) provides that the Commission expedite all proceedings involving applications for pipeline operations. The Commission is given 18 months to dispose of an application; however, it may extend such time period for 90 days.

Subsection (g) requires that the applicant pay for all Commission administrative costs involved in filing the application and the environmental impact statement.

Subsection (h) provides the Commission with authority to waive certain requirements where a carrier wants to extend or increase a coal pipeline and such extension or increase is insignificant.

Subsection (i) provides that prior to approval of an application under this section, the Commission, in consultation with the appropriate officials, must prepare an environmental impact statement with respect to such application under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). Notice of the availability of such statement must be published in the Federal Register.

SECTION 10953. ELECTION OF CONTRACT SERVICE

This new section provides that a coal pipeline may elect to provide all or any part of its service pursuant to contracts. The election must be in writing and be submitted to the Commission. Certificated carriers must exercise this election prior to issuance of a certificate. This section does not apply to any portion of the capacity of a coal pipeline or extension thereof set aside under section 10952(b) for transportation of coal owned by small and independent coal producers.

SECTION 10954. COAL PIPELINE CARRIER OBLIGATION

Subsection (a)(1) provides that if a carrier is authorized a pipeline with capacity sufficient to satisfy the requested service for all the original supporters (a defined term in section 10960), then the carrier must furnish the service requested by the shipper and for which a need has been shown, unless transportation of such coal is not compatible with the operation of such pipeline.

If a carrier is authorized a pipeline with capacity less than that requested, then the carrier must provide original supporters with an equitable share of the service as determined by the Commission.

Subsection (a)(2)(A) provides for a time period of one year, which can be extended up to one additional year, for pipelines and original supporters to enter into contracts. Once an approved contract is entered into, the pipeline has met its obligation. The Commission, upon request, can require a pipeline to extend the pipeline to the shipper's facilities if such extension is technologically, operationally, and economically feasible.

Subsection (a)(2)(B) provides that an original supporter may waive, in writing, all or any portion of its rights under subsection (a).

Subsection (a)(3) provides that an original supporter may file a complaint to enforce its rights under this section.

Subsection (a)(4) provides that if, as a result of a complaint, the Commission determines that the carrier has not entered into a contract within the time specified and (1) the original supporter was ready, willing, and able to enter into a contract or (2) a contract has been entered into but has not been approved, then the Commission may order the carrier to provide service. In addition, the Commission may order that the pipeline be extended to the facilities of

the complainant, if such extension is operationally, technologically, and economically feasible.

Under this section, the Commission shall determine rates and terms and conditions for the transportation service ordered by it, taking into account any terms and conditions of any contracts entered into with other original supporters.

Subsection (b)(1) applies to a contract not covered by the obligation to original supporters under subsection (a)(1) and which if approved would still leave some unused capacity in the pipeline. Where a contract of this type is entered into, the pipeline must hold itself open for similar contacts with other shipper for a period of 60 days or longer. The priority of a contract is established by the date a shipper submits a written offer to the pipeline. This obligation remains in effect until capacity is obligated or for 60 days, or for the time period set by the Commission. Whichever event occurs first tolls the obligation of the pipeline.

Subsection (b)(2) provides that the shipper has 30 days to file a complaint for enforcement of subsection (b)(1).

Subsection (b)(3) provides that where upon complaint, the Commission finds that a pipeline is violating this subsection and has a duty to enter into a contract with the complainant, the Commission shall order service under such terms and conditions as it may determine taking into account the terms and conditions set forth in the shipper's offer and the filed contract. Where contracts are entered into in the incorrect chronological order, the Commission cannot approve them. The Commission may take any action that is necessary pursuant to subsection 10955(g) to carry out this subsection.

Subsection (b)(4) gives the Commission authority to acquire the information it needs to carry out this section.

SECTION 10955. CONTRACTS

Subsection (a) permits all coal pipelines to enter into contracts for the transportation of coal.

Subsection (b) requires that all contracts must be filed. The Commission must publish tariff rules for contracts in order to assure that the essential terms of such contracts are available to the general public in tariff format. Contracts involving certain utilities must be filed with the appropriate state agencies. Such filing must be certified to the Commission.

Subsection (c)(1) requires that all contracts must be approved by the Commission before the contract becomes effective.

Subsection (c)(2) provides that the Commission has 60 days to begin a proceeding to review a contract. The proceeding may be instituted by the Commission or upon complaint. A state agency having jurisdiction over utility rates can file a complaint.

Subsection (c)(3) provides that the Commission has 120 days at most to complete a proceeding commenced by it or upon complaint. During such time the Commission shall either approve or disapprove the contract. If no proceeding has been instituted by complaint or by the Commission, the Commission has 60 days to either approve or disapprove the contract.

Subsection (d) provides that the Commission may not approve (1) a contract if such approval will result in the total tonnage of coal obligated to be transported by the pipeline in any period under contracts approved under this section and under orders issued by the Commission under Section 10954 exceeding the maximum capacity of the pipeline in such period, or (2) a contract which constitutes a destructive competitive practice. Here the Committee expects the Commission to consider whether the terms of the contract constitute predatory practices or pricing. However, it should be noted the term is not otherwise defined.

Subsection (e) prohibits the Commission from approving a contract that violates a term or condition imposed by the Commission on a certificate.

Subsection (f) provides that the Commission may not approve a contract unless it is satisfied that there is capacity available (1) to meet the certificated pipeline's obligation to the original supporters, (2) to provide service set aside for small and independent producers, and (3) to provide the service specified in the contract.

Subsection (g) provides that all contracts must contain a provision for discontinuance or interruption of service in order to accommodate service ordered by the Commission under section 10954 or 11128 of this title.

Subsection (h) provides that all contracts are effective on date approved, but in no event may contracts be approved in less than 60 days after they are filed.

Subsection (i)(1) provides that the Commission may not require a carrier to violate a contract except to comply with section 10954 or section 11128 of this subtitle.

Subsection (i)(2) provides that, except as provided in section 10954, a pipeline cannot be required or obligated to interrupt service under a contract, unless the contract so provides.

Subsection (j)(1) provides that the provisions of Chapter 107 do not apply to contracts once the contracts are approved.

Subsection (j)(2) provides that a pipeline is not a common carrier for the service it provides under a contract.

Subsection (k) provides that any modification of a contract shall be filed with the Commission and the modification is subject to the provisions of this section to the same extent as a contract. Until approved or disapproved, the modification shall not effect the underlying contract being modified.

Subsection (l)(1) provides that except as specified, a contract which is approved and the transportation under such contract, shall not be subject to this subtitle, and it may not be subsequently challenged before the Commission or any court on the grounds that such contract violates a provision of this subtitle.

Subsection (l)(2) provides that after approval of any contract under this section, the exclusive remedy for any alleged breach of such contract shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

Subsection (m) provides two additional definitions (1) "electric utility" means any person, State agency, or Federal agency, which sells electric energy; and (2) "State agency" means any State, political subdivision thereof, and any agency or instrumentality of either.

SECTION 10956. BUY AMERICAN—COAL PIPELINE CONSTRUCTION AND MAINTENANCE

This section stipulates that all articles, materials and supplies used in construction and maintenance of a certificated coal pipeline shall be made in America from articles, materials, and supplies, mined, produced, or manufactured in the United States. The Commission may exempt compliance with subsection (a) if it determines upon application of such pipeline (1) that such requirements would be inconsistent with the public interest, or (2) that such articles, materials and supplies are not available in the United States in sufficient quality or quality, or (3) that inclusion of such articles, materials, or supplies will increase the cost of the overall project contract by more than 25 percent, excluding labor costs, or (4) that the cost of the articles, materials, or supplies is less than $50,000.00.

This provision does not apply to articles, materials, or supplies purchased pursuant to a contract entered into before the date of enactment of this section.

SECTION 10957. CERTAIN ADDITIONAL USERS OF RIGHT-OF-WAY

This section provides that a right-of-way can be acquired over a right-of-way secured under this Act provided it is consistent with and does not interfere with the operation and maintenance of the coal pipeline.

SECTION 10958. SURVEYS AND UNDERGROUND CONSTRUCTION

Subsection (a) provides that pipelines should be underground to the maximum extent practicable and consistent with environmental protection, safety, and good engineering and technological practices. This subsection also requires that a survey be done of the pipeline and the right-of-way upon completion of the project, and that such survey be recorded in accordance with state law.

Subsection (b) requires coal pipelines to do specified things with respect to the land disturbed by the pipeline in the construction process and to use, or allow use of, such lands for the purpose they were used for prior to construction.

SECTION 10959. CONSTRUCTION WORK IN PROGRESS

This section provides that no coal pipeline certificated under this Act may, through the use of a tariff or otherwise, require any electric utility customer to pay, at any time prior to the operation of such pipeline, a fee, surcharge, or other payment relating to such pipeline.

SECTION 10960. DEFINITIONS

This section contains definition of "coal," "coal pipeline," "coal pipeline carrier," "original supporter," "private lands," "right-of-way," and "small and independent producers." They are as follows:

(1) "coal" means any of the recognized classifications of coal, including anthracite, bituminous, semibituminous, subbituminous, and lignite.

(2) "coal pipeline" means any pipeline system for the transportation of coal (whether in a liquid or solid state and whether alone or mixed with other substances) which is or will be constructed (A) from a point in a State to a point in another State, or (B) from a point in a State to another point in such State through another State. A coal pipeline includes the line pipe, valves, pumping stations, coal collection lines or systems, and similar equipment or facilities used or useful in the transportation of coal.

(3) "coal pipeline carrier" means a person providing or seeking to provide transportation of coal by pipeline subject to the jurisdiction of the Commission under subchapter I of Chapter 105 of this subtitle.

(4) "original supporter," as used with respect to a certificate issued under section 10952 of this subchapter, means a shipper of coal who is identified in the application for such certificate as a supporter of such application or who, before such application is filed with the Commission, notifies the Commission of his interest in using the coal pipeline or extension thereof authorized by such certificate and who supports approval of such application in the certification proceeding.

(5) "private lands" means any interest in any land other than interests (A) owned by the United States or owned by any State or any political subdivision thereof; (B) held in trust by United States for an Indian or Indian tribe or owned by an Indian or Indian tribe subject to a restraint against alienation imposed by the United States; or (C) owned by a regional or village corporation established under the Alaska Native Claims Settlement Act, as amended, if such land was transferred to such corporation pursuant to such Act.

(6) "right-of-way" means such interest in land, including an ownership (fee simple) interest, as may be necessary for a coal pipeline.

(7) "small and independent coal producer" means a coal producer who—

(A) produced 200,000 tons or less of coal during the calendar year preceding the calendar year in which the application is filed under this section, and

(B) is not affiliated with any other company.

For purposes of clause (B), a coal producer shall be treated as affiliated with another company if such company controls, is controlled by, or is under common control with such coal producer.

Subsection (b) presents the analysis for Chapter 109 of Title 49, United States Code, as amended by this section.

Subsection (c) is a technical change to existing section 10322 to specify that the Commission appellate procedures do not apply to new sections 10952, 10954, 10955.

Subsection (d) allows the Commission to bring a civil action to enforce this subtitle or a regulation, order, or a condition on a certificate when violated by a certificated coal pipeline carrier.

Subsection (e) states that contracts in effect before the enactment of this Act will not be affected by the Act. In addition, these contracts shall be deemed in accordance with and approved under section 10955.

Section 6. RIGHTS-OF-WAY ACROSS FEDERAL LANDS.—Subsection (a) contains authority for the Secretary of the Interior to grant

rights-of-way across Federal lands to certificated pipeline carriers. If Federal lands are subject to another Department's jurisdiction, the Secretary must consult with such Department. This subsection also provides for interdepartmental cooperation and coordination.

Subsection (b) provides that this Act becomes the governing Act for all certificated carriers for rights-of-way or renewal of rights-of-way across Federal lands.

Subsection (c) provides that rights-of-way over, under, upon, or through any Federal land which is part of a recreation area or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal officials having jurisdiction over such area or refuge or any land which is part of a historic site or national, State, or local significance as determined by the Federal officials having jurisdiction over such site cannot be granted unless there is no feasible and prudent alternative and reasonable planning is made to minimize harm.

Section 7. APPLICABLE REQUIREMENTS CONCERNING FEDERAL LANDS.—Subsection (a) provides that specific provisions of the Federal Land Policy and Management Act of 1976 are made applicable to rights-of-way across Federal lands granted or renewed under section 6 of this Act.

Subsection (b) authorizes the Secretary of the Interior to impose any terms and conditions he deems necessary to carry out the purpose of the Act and to protect the public interest in the Federal lands and lands adjacent to the right-of-way.

Section 8. EXISTING RIGHTS-OF-WAY AND PENDING PROCEEDINGS.—Subsection (a) provides that Title V of the Federal land Policy and Management Act or other applicable law shall apply to the granting and administration of any right-of-way across Federal lands for coal pipelines if (1) the requests were not finally disposed of before the date of enactment of this Act, or (2) requests were made by a person not holding a certificate under this Act.

Subsection (b) states that the administration of rights-of-way across Federal lands granted before the date of enactment of the Act shall be governed by the Federal Land Policy and Management Act or under any other authority of law as applicable.

Subsection (c) provides that certificated pipelines may renew, extend, or acquire a right-of-way over Federal lands only as provided in sections 6 and 7 of this Act.

Subsection (d) provides that sections 6, 7, or 8 of this Act shall not affect lawsuits commenced prior to the date of enactment of this Act.

Section 9. REGULATIONS.—The Secretary of the Interior may issue regulations necessary to carry out the provisions of sections 6, 7, and 8 of this Act.

Section 10. STATE WATER LAW.—Subsection (a) prohibits the United States or any person from claiming water within any State for any coal pipeline except pursuant to State substantive and procedural law.

Subsection (b) expressly delegates to the States the power to establish and exercise in State law terms or conditions for the reservation, appropriation, use, export, or diversion of or other claim of right to, or exercise of any right in water for a coal pipeline not-

withstanding any otherwise impermissible burden which those terms and conditions may impose on interstate commerce.

Subsection (c) provides that nothing in this title shall alter in any way, or affect the validity of, any provision of State law, regulation, or rule of law or of any interstate compact governing the appropriation, use, export, or diversion of, or other claim of right to, water except as provided in subsections (a) and (b). Nothing in this title shall alter the rights of any State to its apportioned share of any body of water, nor shall anything in this title affect water rights of any Indian or Indian tribe. In the event of any conflict between the provisions of this section and any other provision of this title or other Federal law, the provisions of this section shall govern.

Subsection (d) clarifies that this section does not preempt or affect any State or Federal law or interstate compact dealing with water quality or disposal.

Section 11. COAL PIPELINE OPERATIONS.—Subsection (a)(1) requires that within one year after enactment of this Act, the Secretary of Transportation shall issue regulations establishing uniform Federal standards for coal pipelines. For pipelines in existence, for pipelines under construction, or for those with regard to which a final environmental impact statement has been prepared prior to the day the standards are adopted, the standards affecting the design, installation, construction, initial inspection, and initial testing of pipelines shall not be applicable.

Subsection (a)(2) allows the Secretary of Transportation, upon application, to waive compliance of any standard issued under this section if the Secretary determines that such waiver is consistent with coal pipeline safety.

Subsection (a)(3) states that nothing in this section authorizes the Secretary of Transportation to issue Federal standards prescribing the siting or routing of any coal pipeline.

Subsection (a)(4) states that the safety standards issued by the Secretary of Transportation shall apply to all interstate coal pipelines and that no State may adopt or continue to force any safety standards after the effective date of the Federal regulations, except as provided for in subsection (a)(5).

Subsection (a)(5) provides that nothing in this section preempts a state from imposing any additional standard or a more stringent standard unless it discriminates against any coal pipeline or has the effect of prohibiting the construction, operation, or maintenance of any coal pipeline.

Subsection (b) allows the Attorney General, at the request of the Secretary of Transportation, to institute a civil action in a United States district court to enforce any regulation or order issued under this section.

Subsection (c) provides for a civil penalty of not more than $5,000 for each and every day of violation and continued violation of any regulation or order issued under this section after notice of violation and expiration of any period allowed for corrective action. The Secretary of Transportation may assess, compromise, and collect such penalties.

Subsection (d) provides that a person who knowingly and willfully violates any regulation or order under this section or makes any

false statement, representation, or certification in any document filed or required to be maintained under this section shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than one year, or both.

Subsection (e) provides that whenever a person violates any regulation or order issued under this section, any director, officer, or agent of such person who knowingly and willfully authorized, ordered, or carried out such violation shall be subject to those fines and/or terms of imprisonment as those set forth under subsection (d) of this section.

Section 12. ENFORCEMENT AND PENALTIES.—Subsection (a) allows the Attorney General, at the request of the Secretary of the Interior, to institute a civil action in the appropriate United States district court for a restraining order, injunction, or other appropriate remedy to enforce any provision of this Act or any regulation or order issued under the authority of this Act.

Subsection (b) provides for a civil penalty of not more than $5,000 for each and every day of violation and continued violation of any provision of this Act, or any regulation or order issued under the authority of this Act, after notice of violation and expiration of any period allowed for corrective action. The Secretary of the Interior may assess, compromise and collect such penalties.

Subsection (c) provides that any person who knowingly and willfully violates any provision of this Act or any regulation or order issued under the authority of this Act, or makes any false statement, representation, or certification in any document filed or required to be maintained under this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment of not more than one year, or both.

Subsection (d) provides that whenever a person violates any provision of this Act, or any regulation or order issued under the authority of this Act, any director, officer, or agent of such person who knowingly and willfully authorized, ordered, or carried out such violation shall be subject to those fines and/or terms of imprisonment as those set forth under subsection (c) of this section.

Subsection (e) states that this section shall not be construed as reducing or limiting the enforcement authorities vested in the Secretary of the Interior by any other provision of law.

Subsection (f) states that this section does not apply to violations of regulations or orders issued under sections 5 and 11 of this Act.

Section 13. NON-PREEMPTION OF STATE RATEMAKING AUTHORITY.—This section clarifies that nothing in this Act shall be construed as affecting the utility ratemaking authority of the States.

COMMITTEE CONSIDERATION

H.R. 1010 was introduced on January 27, 1983, and was referred to the Committee on Public Works and Transportation and the Committee on Interior and Insular Affairs. The Committee on Interior and Insular Affairs reported H.R. 1010 on April 15, 1983.

This Committee's Subcommittee on Surface Transportation held hearings on April 13 and 19, 1983. The Subcommittee reported H.R. 1010 to the Full Committee with an amendment in the nature of a substitute. On June 8, 1983, the Full Committee met in open

markup session and orderd reported to the House, by a roll call vote of 32 ayes to 18 nays, the bill H.R. 1010 with an amendment.

Cost of Legislation

In accordance with Rule XIII(7) of the Rules of the House of Representatives, the cost of the legislation will not be significant, because H.R. 1010 authorizes the collection of fees by the Interstate Commerce Commission for the purpose of reimbursing certain administrative costs.

Committee Action and Vote

The Committee, in compliance with rule XI(2)(1)(2)(B), the majority of the Committee having actually been present, the final tally on roll call vote to report the bill was 32 ayes and 18 nays.

Compliance With Clause 2(l) of Rule XI of the Rules of the House of Representatives

(1) With reference to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, no separate hearings were held on the subject matter of this legislation by the Subcommittee on Investigations and Oversight. However, the Subcommittee on Surface Transportation held hearings on this subject matter in 1983.

(2) Clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives requires that the report of any committee on a measure which has been approved by the committee shall include the statement required by section 308(a) of the Congressional Budget and Impoundment Control Act of 1974, if the measures provide new budget authority or new or increased tax expenditures. With respect to section 308(a)(1)(A), the letter submitted by the Director of the Congressional Budget Office below satisfies the requirement.

(3) With respect to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee has received a report prepared by the Congressional Budget Office under section 403 of the Congressional Budget Act.

The report is as follows:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., June 13, 1983.

Hon. James J. Howard,
Chairman, Committee on Public Works and Transportation, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 1010, the Coal Pipeline Act of 1983, as ordered reported by the House Committee on Public Works and Transportation, June 8, 1983.

The bill is intended to facilitate the interstate distribution of coal. Upon securing, under applicable state water law, the appropriate authorization for use of water for a coal pipeline, any person seeking to construct, operate, maintain, or extend a coal pipeline may apply to the Interstate Commerce Commission (ICC) for a cer-

tificate of public convenience. The ICC may grant a certificate if it finds that the applicant is fit, willing, and able to provide the proposed operation. In addition, the Attorney General shall conduct an antitrust review to determine whether the application is consistent with antitrust laws. Each applicant is required to reimburse the ICC for administrative and other costs incurred in processing the application. The bill establishes a special account in the Treasury from which appropriations are authorized, beginning in fiscal year 1985, to carry out the processing of the requests for certificates.

Any person issued a certificate by the ICC may acquire rights-of-way through private lands that are necessary to construct and operate the pipeline, by the exercise of the power of eminent domain in the appropriate state court or where state law is not applicable, in the United States district court. Rights-of-way through federal lands may be granted by the Secretary of the Interior in accordance with requirements established in this bill. The Secretary of Transportation is required to establish uniform federal safety standards for operation and construction of a coal pipeline. The bill also establishes additional requirements relating to the operation and construction of the pipeline.

The potential costs to the federal government are associated with the certification and oversight activities required of the ICC, and the actions required of the Secretaries of the Interior and Transportation, and the Attorney General. Because the bill authorizes the collection of fees by the ICC to reimburse certain administrative costs, CBO estimates that the net cost of this bill will not be significant.

CBO does not anticipate any significant direct effect on the budgets of state and local governments as a result of passage of this bill.

CBO has prepared a cost estimate for H.R. 1010, as reported by the House Committee on Interior and Insular Affairs. The costs of the Interior Committee's version of the bill were also not expected to be significant.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director*

(4) With respect to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has not received a report from the Committee on Government Operations pertaining to this subject matter.

(5) With respect to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the following information is provided:

The effects of carrying out H.R. 1010 should be minimal.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 49, UNITED STATES CODE

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SUBTITLE IV—INTERSTATE COMMERCE

* * * * * * *

CHAPTER 103—INTERSTATE COMMERCE COMMISSION

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SUBCHAPTER II—ADMINISTRATIVE

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§ 10322. Commission action and appellate procedure in non-rail proceedings

(a) This section applies to a matter before the Interstate Commerce Commission over which the Commission has jurisdiction under chapter 105 of this title, other than a matter involving a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of such chapter, or section 10934 or 11501(e). The deadlines set forth in this section do not apply to the following sections of this subtitle: 10525(c), 10708(b), 10708(f), 10922(i)(2), 10922(i)(4), 10934(c), 10935, *10952*, *10954*, *10955*, 11345a, and 11701(c). In addition, the deadlines set forth in this section do not apply to any application filed under section 10922(c)(2)(A) of this subtitle for authority to provide regular-route transportation entirely in one State as a motor common carrier of passengers.

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CHAPTER 109—LICENSING

SUBCHAPTER I—RAILROADS AND FERRIES

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SUBCHAPTER III—COAL PIPELINE CARRIERS

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SUBCHAPTER III—COAL PIPELINE CARRIERS

§ 10951. Eminent domain authority

(a)(1) Subject to the other provisions of this section, any person holding a certificate issued under section 10952 of this subchapter to construct a coal pipeline or extension thereof may acquire rights-of-way over, under, upon, or through private lands necessary to construct, operate, and maintain such pipeline or extension by exercise of the power of eminent domain in the appropriate court of the State in which such lands are located and in such manner as may be provided for under applicable State law or, in any case in which State law does not provide for such an action, in the United States district court for the district in which such lands are located, or if located in different districts in the same State, in any of such districts.

(2) Upon petition of any affected landowner, an action brought in a State court under paragraph (1) of this subsection shall be removed to the appropriate United States district court as provided by law.

(3) In any action under paragraph (1) of this subsection, State law shall control the issues of compensation, trial by jury, and siting alternatives, except that State law shall not control if the effect of such law would prohibit an acquisition for reasons unrelated to the acquisition or use of water rights by a coal pipeline carrier and would not allow a reasonable alternative acquisition. Notwithstanding the preceding sentence, if State law does not provide for or permit trials by jury in any such action, any affected landowner shall have the right to a trial by jury in such action.

(b) Nothing in this subchapter shall be construed to permit any person (including the Commission, any other official or employee of the United States, or any coal pipeline carrier) to acquire any right to take, use, or develop water through exercise of the power of eminent domain under this section.

(c) No right-of-way may be acquired through exercise of the power of eminent domain under this section if such right-of-way is over, under, upon, or through—

(1) any land which is part of a historic site of National, State, or local significance as determined by the appropriate Federal, State, or local official; or

(2) any land designated as a wilderness area or wildlife and waterfowl refuge in accordance with applicable law by the duly constituted authority;

unless there is no feasible and prudent alternative to the acquisition of such right-of-way and reasonable planning is made to minimize harm to such site, area, or refuge resulting from construction, operation, and maintenance of the coal pipeline or extension thereof.

(d) No person may exercise the power of eminent domain under this section to acquire any right-of-way unless such person is unable to acquire the right-of-way by negotiation within a reasonable period of time.

(e) Any person who brings an action under this section shall pay all reasonable attorney's fees, as determined by the court, incurred by a landowner if the amount of the final offer to purchase the land in question made to such landowner prior to the initiation of such action is not at least 80 percent of the value of such land as determined in such action; except that the attorney's fees paid to such landowner may only exceed $20,000 if the court makes a finding of bad faith on the part of the person who brings such action.

§ 10952. Certificate

(a)(1) Except as provided in paragraph (2) of this subsection, any person seeking to construct, operate, maintain, or extend a coal pipeline may apply to the Commission for a certificate of public convenience and necessity under this section. Any person seeking to extend a coal pipeline with respect to which a certificate is issued under this section (including, but not limited to, an extension of a coal pipeline from a point in a State to another point in such State) and any person seeking to increase the capacity of a coal pipeline or extension with respect to which a certificate is issued under this section (including, but not limited to, construction of an additional coal pipeline or extension in the right-of-way through which the certificated pipeline or extension is constructed) shall apply to the Commission for a certificate of public convenience and necessity under this section.

(2) No person may apply for a certificate of public convenience and necessity to construct, operate, maintain, extend, or increase the capacity of, a coal pipeline under this section unless such person first files for and secures under applicable State water law approval of a water permit, or acquires other appropriate authorization for reservation, appropriation, purchase, transfer, use, diversion, or export of water, necessary to operate such pipeline or extension.

(b)(1) Subject to the provisions of this section, if the Commission finds that—

(A) a person applying for authority to construct, operate, maintain, extend, or increase the capacity of a coal pipeline is fit, willing, and able—

(i) to construct, operate, and maintain the pipeline or extension; and

(ii) to comply with this subtitle and regulations of the Commission; and

(B) the pipeline or extension or increase in capacity is or will be required by the present or future public convenience and necessity;

the Commission shall approve the application as filed or approve the application with such modifications (including, but not limited to, establishing a capacity for the pipeline or extension greater or less than the capacity proposed in the application) as the Commission finds necessary to protect the public interest. If the application is approved, the Commission shall require compliance with any terms and conditions which the Commission determines are necessary under paragraph (7) of this subsection to satisfy the demand for pipeline transportation of small and independent coal producers and may require compliance with such terms and conditions as the Commission finds necessary to protect the public interest.

(2) If the Commission fails to find the applicant fit, willing, and able, or to find public convenience and necessity, the Commission shall deny the application.

(3) On approval of an application under this subsection, the Commission shall issue to the applicant a certificate (A) describing the construction, operation, maintenance, extension, or increase of capacity approved by the Commission, (B) specifying, at a minimum, the route approved for the coal pipeline or extension and any terms and conditions which the Commission requires under paragraph (1) of this subsection with respect to such approval, and (C) establishing the capacity of the coal pipeline or extension.

(4) In making a determination under paragraph (1)(B) of this subsection, the Commission shall at a minimum consider—

(A) evidence of public support for issuance of the certificate;

(B) the effect of issuance of the certificate on existing carriers who object to issuance of the certificate in the certification proceeding, except that a finding by the Commission that diversion of revenue or traffic from an existing carrier shall not be sufficient in and of itself to support a finding that issuance of the certificate is not required by the present or future public convenience and necessity; and

(C) the past record, written plan, and sufficiency of assurances that the applicant will make maximum use of minority employees and minority-owned enterprises in the construction, operation, maintenance, extension, or increase in the capacity of the coal pipeline.

(5) The requirement that persons issued certificates under this section be fit, willing, and able includes, among other things, financial fitness, operational fitness, and safety fitness.

(6) In determining the capacity of a coal pipeline or extension to be authorized under this section, the Commission shall consider—

(A) any contracts for the transportation of coal by such pipeline or extension entered into or proposed on or before the date the application for the certificate is filed under this section;

(B) any contracts for the transportation of coal which may be reasonably anticipated to be entered into after such date; and

(C) such other factors as may be relevant to such determination.

(7) For the purpose of protecting small and independent coal producers, if, before approval under this section of an application for

authority to construct, extend, or increase the capacity of a coal pipeline, the Commission determines, that it is in the public interest for the applicant to make available a portion of the capacity of the coal pipeline or extension thereof for transportation of coal owned by small and independent coal producers in the geographic region where the coal pipeline or extension thereof originates, the Commission shall require, as a term or condition of approval of the application, that the applicant set aside and use, for transportation of coal owned by such producers which is compatible with operation of the pipeline or extension, the lesser of—

(A) 10 percent of the total pipeline capacity, or

(B) that portion of the total pipeline capacity necessary to satisfy the total pipeline transportation demand of all such producers.

The Commission may require that pipeline transportation for such producers be provided on reasonable request or under nondiscriminatory contracts or both.

(c) An application for a certificate under this section must—

(1) be under oath;

(2) contain (A) a plan for construction, operation, maintenance, and location of the coal pipeline or extension thereof, (B) the proposed capacity of such pipeline or extension, (C) the size of the right-of-way necessary to construct, operate, and maintain such pipeline or extension, and (D) such other information as the Commission may require by regulation; and

(3) contain a certification by the applicant that a copy of the application has been served on the chief executive officer of each State through which the proposed pipeline or extension passes and on such other persons (including government officials) as the Commission may designate by regulation.

Notice of the filing of such application must be published in the Federal Register.

(d)(1) Except as provided in subsection (h) of this section, the Commission may not approve an application for a certificate under this section unless before the application is filed with the Commission—

(A) the applicant has a notice of intention to file the application published for at least 4 consecutive weeks in a newspaper of general circulation in each county through which the coal pipeline or extension thereof passes;

(B) the applicant sends a copy of such notice to the Commission and to the chief executive officer of each State through which the proposed pipeline or extension passes;

(C) the applicant takes such other steps as may be necessary to notify interested coal producers and coal users of the filing of such application;

(D) the applicant offers to make available to small and independent coal producers in the geographic region where the proposed pipeline or extension is to originate, for transportation of coal owned by such producers, the lesser of—

(i) 10 percent of the total pipeline capacity, or

(ii) that portion of the total pipeline capacity necessary to satisfy the total pipeline transportation demand of all such producers; and

(E) at least 90 days have elapsed since the final publication of the notice required under subparagraph (A) of this paragraph.

Such notice shall, at a minimum, include the proposed location of such pipeline or extension and a general description of lands over, under, upon or through which such pipeline or extension will be constructed and indicate that any person who is interested in using such pipeline or extension to transport coal shall notify the applicant and the Commission of such interest.

(2) Any person interested in using a coal pipeline or extension thereof to transport coal may notify the applicant and the Commission of such interest. Any such notification, shall specify the volume and type of coal which such person is interested in having transported by the pipeline or extension.

(3) Not later than 180 days after the effective date of this section, the Commission shall issue regulations to carry out this subsection (including, but not limited to, regulations establishing the form and content of the notice to be published under paragraph (1)(A) of this subsection and the notification to be provided under paragraph (2) of this subsection).

(e)(1) At each stage in the formulation and promulgation of rules and regulations under this subchapter, and at each stage in the issuance of certificates under this subchapter, the Commission shall consult with and give due consideration to the views and advice of the Attorney General.

(2) Not later than 10 days after any application for a certificate under this section is filed with the Commission, the Commission shall notify the Attorney General of the filing of such application and shall provide the Attorney General with a copy of such application and such other information as the Attorney General may request. The Attorney General shall conduct an antitrust review to determine the likely effects upon competition of approval of such application and, not later than 120 days after the date of receipt of such notification, shall advise the Commission of the results of such review, including, but not limited to, findings and recommendations concerning such terms and conditions (including, but not limited to, any term or condition relating to the ownership or use of the pipeline) as the Attorney General deems necessary to protect and promote competition. No application may be approved under this section if the Attorney General advises the Commission in writing that, on the basis of such review, approval of such application is not consistent with the antitrust laws.

(3) Nothing in this subchapter shall be deemed to grant to any person, immunity from civil or criminal liability, or to create defenses to actions, under any antitrust law.

(4) In this subsection—

(A) "antitrust laws" includes the Clayton Act (15 U.S.C. 12 et seq.), the Sherman Act (15 U.S.C. 1 et seq.), and the Wilson Tariff Act (15 U.S.C. 8 et seq.).

(B) "antitrust review" has the meaning the term "antitrust investigation" has under section 2 of the Antitrust Civil Process Act (15 U.S.C. 1311).

(f) Except as provided in subsection (h) of this section, the Commission, or a division thereof designated by the Commission, shall

expedite hearings and proceedings concerning any application filed under this section and shall schedule all hearings, proposed findings and conclusions, exceptions, and any recommended decisions so that the Commission's final decision shall be issued and completed within 18 months after the date of the filing of the application, except that the Commission may extend such 18-month period for a period of not more than 90 days.

(g)(1) Each applicant for a certificate under this section shall reimburse the Commission for administrative and other costs incurred by the Commission in processing the application in such manner as the Commission shall, by rule, prescribe.

(2) The Commission is authorized to require a deposit of any payments under paragraph (1) of this subsection intended to reimburse the United States for administrative and other costs with respect to any application filed under this section. The moneys received for administrative and other costs under this subsection shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated to carry out this section for fiscal years beginning after September 30, 1984, and shall remain available until expended.

(3) In this subsection, "administrative and other costs" include, but are not limited to, the costs of special studies, environmental impact statements, or other special activities.

(h) Upon petition of any person applying for a certificate to extend a coal pipeline with respect to which a certificate is issued under this section or to increase the capacity of a coal pipeline or extension with respect to which a certificate is issued under this section, the Commission may waive the application of subsections (b)(1) and (d) of this section to the issuance of the certificate for such extension or increase if the Commission finds that such extension or increase is not a significant modification of the original certificate issued under this section. If the Commission waives the application of subsections (b)(1) and (d) of this section to the issuance of any certificate under this subsection, the Commission shall approve the application for such certificate, and issue such certificate, within 180 days after receiving the petition for the waiver. If any application is approved under this subsection, the Commission shall require compliance with any terms and conditions which the Commission determines are necessary under paragraph (7) of subsection (b) to satisfy the demand for pipeline transportation of small and independent coal producers and may require compliance with such terms and conditions as the Commission finds necessary to protect the public interest.

(i) No application may be approved under this section unless an environmental impact statement is prepared with respect to such application under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) and notice of the availability of such statement is published in the Federal Register. Such statement shall be prepared by the Commission in consultation with the head of any other department, agency, or instrumentality of the United States which will be involved if such application is approved.

§ 10953. Election of contract service

In lieu of providing transportation by coal pipeline as a common carrier under this subtitle, any coal pipeline carrier may elect to provide all or any part of such transportation under contracts entered into with shippers of coal and approved under section 10955 of this subtitle. An election under this section must be submitted in writing to the Commission in such form and at such times as the Commission may require by regulation; except that in the case of a coal pipeline carrier who applies for a certificate under section 10952 of this subchapter, an election under this section to provide all or any part of the transportation to be authorized by such certificate must be submitted to the Commission before issuance of such certificate. This section shall not apply to any portion of the capacity of a coal pipeline or extension thereof set aside under section 10952(b) of this subchapter for transportation of coal owned by small and independent coal producers.

§ 10954. Coal pipeline carrier obligation

(a)(1) Any person who constructs, extends, or increases the capacity of a coal pipeline in accordance with a certificate issued under section 10952 (other than subsection (h)) of this subchapter and who elects under section 10953 of this subchapter to provide transportation by such pipeline under contracts shall provide for each original supporter of the certificate transportation of that volume of coal which the original supporter requested in the certification proceeding and for which the original supporter shows need unless transportation of such coal is not compatible with operation of such pipeline. In any case in which the capacity established for the coal pipeline or extension thereof under the certificate (other than any portion of such capacity set aside under section 10952(b) of this subchapter for transportation of coal owned by small and independent coal producers) is less than the capacity necessary to transport the total volume of coal requested in the certification proceeding by all the original supporters of the certificate and for which such original supporters show need, the carrier shall provide for each original supporter of the certificate transportation of that volume of coal which the Commission determines is such original supporter's equitable share of the capacity established under the certificate unless transportation of such coal is not compatible with operation of such pipeline.

(2)(A) During the one-year period beginning on the date of issuance of a certificate under section 10952 (other than subsection (h)) of this subchapter or during such longer period as the Commission may specify, but in no event longer than the two-year period beginning on such date, the carrier issued such certificate may enter under section 10955 of this subchapter into contracts with original supporters of such certificate to satisfy the obligation imposed on such carrier by this subsection. If, during such period, the carrier enters into a contract with an original supporter of such certificate and if the Commission approves such contract under section 10955 of this subchapter, the obligation imposed by this subsection on the carrier to such supporter shall be deemed to be met for purposes of this subsection. On request of such supporter, the carrier shall

extend the coal pipeline to the facilities of such supporter for the purpose of providing transportation under such contract if such extension is technologically, operationally, and economically feasible.

(B) Any original supporter of a certificate issued under section 10952 (other than subsection (h)) of this subchapter may waive, in writing, all or any part of any obligation imposed by this subsection with respect to such original supporter. To the extent an original supporter of a certificate waives under this paragraph the obligation imposed on the carrier by this subsection to transport coal for such supporter, the volume of coal which the carrier is obligated to transport for such supporter under this subsection shall be reduced.

(3) Not later than the 150th day following the last day of the one-year period beginning on the date of issuance of a certificate under section 10952 (other than subsection (h)) of this subchapter or the last day of such longer period as the Commission may specify, but in no event longer than the last day of the two-year period beginning on such date, any original supporter of such certificate may file with the Commission a complaint under this section.

(4) If, on a complaint filed in accordance with paragraph (3) of this subsection by an original supporter of a certificate, the Commission determines—

(A)(i) that, in the one-year period beginning on the date of issuance of such certificate or in such longer period as the Commission may specify, but in no event longer than the two-year period beginning on such date, the carrier issued the certificate has not entered into a contract with such supporter under section 10955 of this subchapter to provide transportation of coal; and

(ii) that such supporter was ready, willing, and able to enter into a contract with such carrier to provide transportation of the volume of coal such carrier is obligated to provide to such original supporter under this subsection; or

(B) that, in such period, such carrier has entered into such a contract and that such contract has not been approved under section 10955 of this subchapter;

the Commission may order such carrier to provide for such supporter transportation of such volume of coal. In addition, if the Commission finds that extension of the coal pipeline to the facilities of the complainant is technologically, operationally, and economically feasible, the Commission may order such carrier to extend the coal pipeline to such facilities. Rates and other terms and conditions for transportation ordered under this subsection shall be determined by the Commission, taking into account terms and conditions of any contracts which the carrier entered into with other original supporters of such certificate and any increased costs resulting from any extension of the coal pipeline to the facilities of the complainant.

(b)(1) Any coal pipeline carrier who files under section 10955 of this subchapter a contract (other than a contract to which subsection (a)(2)(A) of this section applies) for transportation of a volume of coal less than the volume of coal which would totally obligate the capacity of the pipeline or extension thereof (other than any portion of such capacity set aside under section 10952(b) of this subchapter for transportation of coal owned by small and independent coal producers) for providing transportation under contracts ap-

proved under such section and under orders issued by the Commission under this section shall, in the 60-day period beginning on the date of the filing of such contract or such longer period as the Commission may establish by regulation, enter into contracts with shippers (other than the shipper who entered into the filed contract) under terms and conditions similar to the terms and conditions contained in the contract filed by the carrier. The carrier shall enter into such similar contracts in the chronological order in which written offers to enter into such similar contracts are submitted to such carrier. The obligation imposed by this subsection shall remain in effect (A) until the capacity of the pipeline or extension thereof (other than any portion of such capacity set aside under section 10952(b) of this subchapter for transportation of coal owned by small and independent coal producers) is totally obligated for providing transportation under contracts approved under such section and under orders of the Commission under this section, or (B) until the last day of such period, whichever occurs first.

(2) Not later than the 30th day following the last day of such period, a shipper of coal may file a complaint with the Commission on the grounds that the carrier is violating this subsection.

(3) If, after notice and an opportunity for a proceeding under section 10322 of this subchapter but not later than the 90th day following the filing of a complaint in accordance with paragraph (2) of this subsection, the Commission finds that (1) the carrier is violating this subsection and has with respect to the complaining shipper an obligation under this subsection to enter into a contract, and (2) the complaining shipper is ready, willing, and able to enter into such contract, the Commission shall order the carrier to provide the service specified in the offer under such terms and conditions as the Commission may determine taking into account the terms and conditions contained in such offer and in the filed contract. In addition, if the Commission finds that the carrier, in entering into contracts with shippers of coal pursuant to paragraph (1) of this subsection, violates this subsection by entering into such contracts in a chronological order other than the order in which the offers are submitted to the carrier, the Commission shall not approve under section 10955 of this subchapter those contracts entered into in improper order and may take such other action as may be necessary pursuant to subsection (g) of such section to carry out this subsection.

(4) The Commission may require, by regulation, coal pipeline carriers to submit such information at such times and in such form as the Commission determines is necessary to carry out the objectives of this subsection.

§ 10955. Contracts

(a) Subject to the provisions of this section and section 10954 of this subchapter, any coal pipeline carrier who elects under section 10953 of this subchapter to provide under contract all or any part of the transportation of coal which such carrier provides by pipeline may enter into a contract with any shipper of coal to provide transportation of coal under such rates and conditions as the contract may specify.

(b) Each contract entered into under this section or section 10954 of this subchapter shall be filed with the Commission. The Commis-

sion shall publish special tariff rules for contracts filed under this section in order to assure that the essential terms of such contracts are available to the general public in tariff format. In any case in which one of the parties to the contract is an electric utility with respect to which any State agency or the Tennessee Valley Authority has ratemaking authority, such contract shall be filed with the Commission together with a certification that a copy of such contract has been filed with the State agency or the Tennessee Valley Authority, as the case may be.

(c)(1) Before a contract filed under this section or section 10954 of this subchapter may become effective, such contract shall be approved by the Commission under this section.

(2) Not later than 60 days after the date of filing of a contract under this section, the Commission may, on its own initiative or on complaint (including a complaint by a State agency which has ratemaking authority with respect to the sale of electric energy by any electric utility), begin a proceeding to review such contract.

(3) Not later than 60 days after the date of filing of a contract under this section, the Commission shall approve or disapprove such contract in accordance with the provisions of this section, except in any case in which the Commission begins a proceeding to review such contract in accordance with paragraph (2) of this subsection, the Commission shall approve or disapprove such contract in accordance with the provisions of this section within 120 days after the date such proceeding is commenced or within such shorter period as the Commission may establish.

(d) The Commission may not approve under this section any contract for the transportation of coal by pipeline—

(1) if approval of such contract will result in the total tonnage of coal obligated to be transported by the pipeline in any period under contracts approved under this section and under orders issued by the Commission under section 10954 of this subchapter exceeding the maximum capacity of the pipeline (other than any portion of such capacity set aside under section 10952(b) of this subchapter for transportation of coal owned by small and independent coal producers) in such period; or

(2) if such contract constitutes a destructive competitive practice.

(e) The Commission may not approve under this section any contract for the transportation of coal by a pipeline with respect to which a certificate is issued under section 10952 of this subchapter if such contract violates any term or condition imposed by the Commission with respect to such certificate.

(f) The Commission may not approve under this section any contract for the transportation of coal by a pipeline with respect to which a certificate is issued under section 10952 of this subchapter unless the Commission is satisfied that the pipeline has sufficient capacity available (1) to provide the service specified in the contract, (2) to meet the obligation, if any, imposed by section 10954(a) of this subchapter on such carrier to provide service for the original supporters of such certificate, and (3) to provide transportation for small and independent coal producers under any set aside required under section 10952(b) of this subtitle.

(g) Any contract for transportation of coal by pipeline approved under this section shall contain a provision which allows the coal pipeline carrier to interrupt or discontinue service under such contract to provide such service as the Commission may order under section 10954 or 11128 of this subtitle.

(h) Approval of a contract filed under this section shall be effective on the date the Commission approves such contract but in no event before the last day of the 60-day period beginning on the date such contract is filed.

(i)(1) The Commission may not require a coal pipeline carrier to violate the terms of a contract filed under this section except to the extent necessary to comply with this section or section 10954 or 11128 of this subtitle.

(2) Except as provided under section 10954 of this subchapter, a coal pipeline carrier shall not have the right or obligation to interrupt service under a contract approved under this section for the purpose of prorating pipeline service to other shippers unless the terms of the contract provide otherwise.

(j)(1) The provisions of chapter 107 (other than section 10721) of this subtitle shall not apply to any contract approved under this section.

(2) Notwithstanding the provisions of section 10102(4) of this subtitle, a coal pipeline carrier providing transportation of coal by pipeline under a contract approved under this section shall not while providing such transportation be a common carrier for purposes of this subtitle.

(k) Any modification of a contract approved under this section shall be filed by the carrier with the Commission under this section and shall be subject to the provisions of this section in the same manner and to the same extent as any contract filed under this section.

(l)(1) Except as provided in sections 10954 and 10959 of this subchapter and subsections (g) and (k) of this section, a contract which is approved by the Commission under this section, and transportation under such contract, shall not be subject to this subtitle, and may not be subsequently challenged before the Commission or any court on the grounds that such contract violates a provision of this subtitle.

(2) After approval of any contract under this section, the exclusive remedy for any alleged breach of such contract shall be in an action in an appropriate State court or United States district court, unless the parties otherwise agree.

(m) In this section—

(1) "electric utility" means any person, State agency, or Federal agency, which sells electric energy.

(2) "State agency" means any State, political subdivision thereof, and any agency or instrumentality of either.

§ 10956. Buy American—coal pipeline construction and maintenance

(a) Except as provided in subsection (b) of this section, all articles, materials, and supplies used in the construction and maintenance of a coal pipeline for which a certificate is issued under section 10952 shall have been manufactured in the United States from arti-

cles, materials, and supplies mined, produced, or manufactured, as the case may be, in the United States.

(b) The Commission may, upon application of a person holding a certificate issued under section 10952, exempt such person from the requirements of subsection (a) of this section with respect to the purchase of particular articles, materials, or supplies, if the Commission determines that—

(1) the application of such requirements with respect to such articles, materials, or supplies would be inconsistent with the public interest;

(2) such articles, materials, or supplies, or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities or of a satisfactory quality;

(3) inclusion of such articles, materials, or supplies will increase the cost of the overall project contract (excluding the cost of labor in the final assembly of any such article, material, or supply) by more than 25 percent; or

(4) the cost of the articles, materials, or supplies to be purchased is less than $50,000.

(c) The provisions of this section shall not apply in the case of articles, materials, or supplies purchased pursuant to a contract entered into before the date of enactment of this section.

(d) In this section, "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

§ 10957. Certain additional uses of right-of-way

Nothing in this subchapter shall prevent any person or governmental entity from using the power of eminent domain under Federal or State law to acquire the right to cross or otherwise use any portion of a right-of-way acquired in whole or part under this subchapter in any case in which the crossing or use of such right-of-way by such person or entity is consistent with and does not interfere with the operation and maintenance of the coal pipeline.

§ 10958. Underground construction, surveys, and land restoration

(a) The line pipe of each coal pipeline and extension thereof with respect to which a certificate is issued under section 10952 of this subchapter shall to the maximum extent practicable, consistent with environmental protection, safety, and good engineering and technological practices, be located underground. Upon completion of construction of such line pipe, a survey of the coal pipeline or extension thereof and the right-of-way shall be conducted and recorded under the applicable statutes, if any, of the State or States in which the coal pipeline or extension thereof and right-of-way are located.

(b) Upon completion of construction of any coal pipeline or extension thereof with respect to which a certificate is issued under section 10952 of this subchapter, the coal pipeline carrier—

(1) shall—

(A) replace sufficient topsoil; and

(B) provide for revegetation, restoration, and curtailment of erosion;

in order to restore, to the maximum extent feasible, the lands over, under, upon, and through which the pipeline or extension is constructed to their condition before such construction; and

(2) shall, wherever possible, use such lands, or allow such lands to be used, for the purposes for which they were used before such construction.

§ 10959. Construction work in progress

(a) Any coal pipeline carrier holding a certificate issued under section 10952 of this title may not, through use of a tariff or otherwise, require any of its electric utility customers to pay, at any time prior to the operation of the coal pipeline for which such certificate is issued, a fee, surcharge, or other payment relating to such pipeline.

(b) In this section—

(1) "electric utility" means any person, State agency, or Federal agency, which sells electric energy.

(2) "State agency" means any State, political subdivision thereof, and any agency or instrumentality of either.

§ 10960. Definitions

In this subchapter—

(1) "coal" means any of the recognized classifications of coal, including anthracite, bituminous, semibituminous, subbituminous, and lignite.

(2) "coal pipeline" means any pipeline system for the transportation of coal (whether in a liquid or solid state and whether alone or mixed with other substances) which is or will be constructed (A) from a point in a State to a point in another State, or (B) from a point in a State to another point in such State through another State. A coal pipeline includes the line pipe, valves, pumping stations, coal collection lines or systems, and similar equipment or facilities used or useful in the transportation of coal.

(3) "coal pipeline carrier" means a person providing or seeking to provide transportation of coal by pipeline subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this subtitle.

(4) "original supporter", as used with respect to a certificate issued under section 10952 of this subchapter, means a shipper of coal who is identified in the application for such certificate as a supporter of such application or who, before such application is filed with the Commission, notifies the Commission of his interest in using the coal pipeline or extension thereof authorized by such certificate and who supports approval of such application in the certification proceeding.

(5) "private lands" means any interest in any land other than interests (A) owned by the United States or owned by any State or any political subdivision thereof; (B) held in trust by the United States for an Indian or Indian tribe or owned by an Indian or Indian tribe subject to a restraint against alienation imposed by the United States; or (C) owned by a regional or village corporation established under the Alaska Native Claims Settlement Act, as amended, if such land was transferred to such corporation pursuant to such Act.

(6) "right-of-way" means such interest in land, including an ownership (fee simple) interest, as may be necessary for a coal pipeline.

(7) "small and independent coal producer" means a coal producer who—

(A) produced 200,000 tons or less of coal during the calendar year preceding the calendar year in which the application is filed under this section, and

(B) is not affiliated with any other company.

For purposes of clause (B), a coal producer shall be treated as affiliated with another company if such company controls, is controlled by, or is under common control with such coal producer.

* * * * * * *

CHAPTER 117—ENFORCEMENT: INVESTIGATIONS, RIGHTS, AND REMEDIES

* * * * * * *

§ 11702. Enforcement by the Interstate Commerce Commission

(a) The Interstate Commerce Commission may bring a civil action—

(1) to enjoin a rail carrier from violating section 10901–10907 or 10933 of this title, or a regulation prescribed or certificate issued under any of those sections;

(2) to enforce section 10527 or 10930 or 11109 or 11111 or 11323 of this title, or subchapter III of chapter 113 of this title and to compel compliance with the order of the Commission under any of those sections and that subchapter;

(3) to enforce an order of the Commission, except a civil action to enforce an order for the payment of money, when it is violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title;

(4) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title;

(5) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle, except a civil action to enforce an order for the payment of money, when violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter III of chapter 105 of this title; [and]

(6) to enforce this subtitle, or a regulation or order of the Commission or permit issued under this subtitle when violated by a carrier providing service subject to the jurisdiction of the

Commission under subchapter IV of chapter 105 of this title[.]; *and*

(7) to enforce this subtitle or a regulation or order of the Commission or a certificate issued under this subtitle when violated by a coal pipeline carrier who holds a certificate issued under section 10952 of this subchapter.

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ADDITIONAL VIEWS OF HON. NICK J. RAHALL II

In our drive to increase the production and utilization of domestic energy resources it is reassuring to note that overall coal production has been on the increase. However, at the same time, there has been a trend toward fewer and larger companies mining coal. Between 1978 and 1980, for example, there was a 21 percent reduction in the number of mines producing 200,000 or less tons of coal per year.

Many economists say the coal industry will follow a continuing pattern of concentration, with smaller producers being driven out-of-business due to their inability to raise the necessary capital to remain competitive. This is particularly disturbing since competition within the production of coal is one of the major factors in this energy source remaining economical.

A major concern I have with coal slurry pipelines is that they may contribute toward the demise of the small and independent coal producer. A few large coal companies relatively close to the origin of a coal slurry pipeline would be able to keep the pipeline filled. Economically, the pipeline companies would attempt to keep transportation contracts administered to a minimum number. Moreover, electric utilities receiving coal from a pipeline would do so under long-term contracts with coal suppliers. Unfortunately, few if any users of coal will sign long-term contracts with small coal producers.

As such, without any protections, small and independent coal producers would not be able to utilize coal slurry pipelines. Coal slurry pipelines would not benefit these producers in any way as they would still be "captive" to railroad transportation. In fact, the possibility exists that the pipelines would act to the detriment of these producers. In an area close to the origin of a pipeline, as the railroads lose revenue and traffic from large coal producers using the pipeline they may raise railroad rates on the remaining producers who are unable to tap into the pipeline as a way to make-up for lost business. Increases in transportation rates and even the loss of transportation due to rail line abandonments would eventually drive small coal producers out-of-business.

In a September 29, 1982, letter from the Congressional Budget Office to Senator James Exon it is stated that "railroads may respond to the loss of coal transportaiton revenue by raising rates for coal and other commodities." The Coal Operator, a coal-field publication from Beckley, West Virginia, has editorialized: "We do not believe the coal slurry pipelines would be good for the entire coal industry. They would not help, but hurt, production in the bulk of coal mining areas in our country."

It should be noted that there is not unity within the coal industry on coal slurry pipelines. The Alabama Coal Association and the Pennsylvania Coal Mining Association, for example, have adopted

positions against coal slurry pipelines. the Virginia Coal Council in a letter to me stated that support for coal slurry pipelines is "counterprodcutive." In addition, several West Virginia coal producers have told me of their opposition to the pipelines. Finally, the coal labor union, the United Mine Workers of America, is opposed to coal slurry pipelines.

Because of my concern over the adverse impacts coal slurry pipelines would have on small and independent coal producers, H.R. 1010 contains a provision meant to facilitate their access to the pipelines by requiring a set-aside of pipeline capacity for their use. A provision with a similar intent is contained in H.R. 1010 as reported by the Committee on Interior and Insular Affairs, of which I am a member.

I note that this provision does not afford ironclad protection for small and independent coal produers. Its implementation is incumbent upon the Interstate Commerce Commission which has a history of showing some disregard for coal interests, or in the case of the Committee on Interior and Insular Affairs' bill, upon the Secretary of the Interior, who may not have the necessary expertise is the area of coal transportation.

Nonetheless, it is surely in the public interest to have a competitive coal industry. Preservation of this competition by maintaining coal production from small and independent operators ultimately benefits consumers of electricity generated by coal-fired powerplants who will continue to enjoy the economic advantages coal holds over other boiler fuels.

NICK RAHALL.

DISSENTING VIEWS OF REPRESENTATIVES SNYDER, OBERSTAR, HAMMERSCHMIDT, NOWAK, SHUSTER, EDGAR, STANGELAND, RAHALL, MOLINARI, APPLEGATE, McEWEN, KATIE HALL, DAUB, KOLTER, LYNN MARTIN, LIPINSKI, ROWLAND, AND WISE

This coal slurry pipeline bill is blatant special interest legislation tht confers the power of the Federal right of eminent domain to a select few private corporations. It should be defeated. If this legislation has any claim to distinction, it lies in the extent to which it takes an inherently wrong-headed idea and manages to make it incomparably worse by means of the one-sided concessions it makes to the interest which it zealously promotes.

A simple Federal eminent domain bill enabling coal slurry pipeline operators to acquire right-of-way—which this legislation manifestly is not—would in and of itself be questionable public policy. But this bill is that and much more, which should give pause to even those who would generally favor some form of coal slurry bill. This bill is a complex measure with far-reaching implications for transportation, water resources, energy, environment, jobs, agriculture, consumer protection, regulation, competition, and relations among the States and between States and the Federal government. In all of these areas, in virtually every instance in which the special interests of the pipeline industry would be inconvenienced by the public interst, the special interests tend to prevail.

As the discussion of specific issues below will demonstrate, the reported bill omits protective provisions which have been incorporated in previous versions of this legislation over the years, and which at least some in the slurry industry would accept as reasonable or which address problems which slurry proponents concede to be legitimate concerns meriting attention by Congress. In our view, these excesses call into serious question the extent to which the merits of Federal promotion of coal slurry pipelines as a general proposition have been subjected to critical scrutiny by proponents of this bill.

One might reasonably inquire how a measure so lacking merit—happily a rarity in major legislation reported by this Committee—could emerge. A principal reason is the number and complexity of the issues, and a lack of time to explore them in appropriate depth. This lack stems in part from the terms of a referral which made the Committee on Interior and Insular Affairs the lead Committee, and placed Public Works and Transportation in a secondary role and under unreasonable time constraints, despite the established fact that at least 80 percent of the reported bill represents matters within the exclusive jurisdiction of the latter Committee.

Another reason is lack of information with respect to such fundamental issues as potential ownership and control relationships between utilities, pipelines and producers of coal, and the contracting

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relationships contemplated by the industry. These the industry flatly refuses to divulge in even the most general terms, carrying legitimate business confidentiality to considerable extremes. There is a disappointing predisposition to assume that, in the absence of statutory provisions specifically tailored to this new industry, one can rely with confidence on the flawless business judgment of utilities, the Interstate Commerce Commission (whose alleged laxity concerning rail rates for coal is cited as a chief argument for this legislation) and state public utility commissions to protect the consumer and the public at large. Finally, as a result of arguments long on rhetoric and short on rationale, a number of altogether reasonable perfecting amendments have been dismissed out of hand as crippling or "killer" amendments.

Slurry proponents perpetually allege that it is the railroads who are blocking the construction of coal slurry pipelines. This is nothing more than a smokescreen, for it should be emphasized that we repeatedly have offered an amendment to limit the right of Federal eminent domain—one that gives that right only over railroad property. By opposing this amendment, slurry proponents are implicitly acknowledging that their problems are not caused by or limited to the railroads.

Members considering support of the reported bill as is would do well to ponder the discomfort of one Member of the Senate, who was attempting last year to rectify deficiencies in the Natual Gas Policy Act of 1978 which has subjected natural gas consumers to what this bill may well lead to in the case of customers of utilities served by coal pipelines. When asked how he voted on the Act, he answered: "I unfortunately voted for that dog, and I am here tonight to expiate my sin."

Following is a list of specific objections to the bill as reported. We are all opposed to H.R. 1010, although each of us does not necessarily subscribe to each objection.

1. H.R. 1010 fails to provide protection to the public by omitting any requirements that coal pipeline companies operate as common carriers.

2. H.R. 1010 would effectively eliminate ICC regulation of coal pipeline rates.

3. H.R. 1010 does absolutely nothing to protect consumers of utilities served by coal slurry pipelines from being victimized by long-term take-or-pay contracts.

4. H.R. 1010 provides no protection for the consumer from pass-throughs of construction cost overruns in the form of higher utility rates.

5. H.R. 1010 does not contain any "control" provision to restrict vertical integration and thus does not contain adequate protection against discrimination and monopoly profits that may result from interlocking ownership arrangements between coal slurry pipelines and coal suppliers and users.

6. H.R. 1010 contains no adequate protection of the consumer against the dangers of being required to pay in advance for a pipeline that may never be completed.

7. H.R. 1010, by allowing coal slurry operators to siphon off the most profitable, long-haul coal traffic, will result in higher rates, diminished service, or both for other commodities moved by rail.

8. H.R. 1010 will result in a significant loss of permanent jobs.
9. H.R. 1010 unwisely delegates the Federal power of eminent domain to private corporations that will not serve as common carriers and will not necessarily serve a public use.
10. H.R. 1010 is opposed by the Administration.
11. H.R. 1010 weakens environmental protections, thereby conferring a special-interest windfall on slurry operators.
12. H.R. 1010 is not based on any reasonable assurances, sound research, or comprehensive study that the effluent water from the pipeline is environmentally safe.
13. H.R. 1010 provides no assurances against transportation of unconventional mixtures whose safety and environmental effects have not been assessed.
14. H.R. 1010 has no protection for the environment from potential hazards caused by slurry spills.
15. H.R. 1010 would adversely affect farmers and contribute to an alarming trend in farmland depletion.
16. H.R. 1010 omits protection in existing law whereby State standards governing public health, safety and environmental protection shall apply, if more stringent than Federal standards to pipelines crossing Federal land.
17. H.R. 1010 fails to protect State laws governing the location, construction, operation or maintenance of coal slurry pipelines in conformity with legitimate State interests.
18. H.R. 1010 does violence to traditional State eminent domain authority.
19. H.R. 1010 singles out the ETSI pipeline for special favors.
20. H.R. 1010 provides no protection for States sharing ground or surface water with a State in which diversion of shared water for a coal slurry pipeline occurs.
21. H.R. 1010 fails to protect and preserve the primacy of State water law.
22. H.R. 1010 by fostering the unprecedented interbasin transfer of scarce water from arid regions of the country, represents unsound water resource policy.

Lack of Common Carrier Obligations

H.R. 1010 fails to provide protection to the public by omitting any requirement that coal pipeline carriers operate as common carriers.

Only the provision of Federal eminent domain and the unprecedented State water rights language—and perhaps the failure to protect the consumer against take-or-pay contracts—surpass this particular failing as examples of the extent to which this legislation unabashedly promotes coal slurry pipelines. This failing is all the more unacceptable for two additional reasons: (1) The fact that common carrier obligations may be waived in the case of pipelines which do not seek eminent domain, for which no finding of public convenience and necessity is made, and which therefore have not met the public interest tests prescribed in the legislation; and (2) such obligations have been contained in earlier legislation and proclaimed to be acceptable by the leading pipeline project now under development.

1. *Need for the Protection:* When this Committee reported out H.R. 1609 in the 95th Congress, that measure contained a requirement that pipeline carriers be common carriers in fact, rather than in name only. Its reasoning, according to the report:

> This position was adopted to insure that the Interstate Commerce Commission would have full regulatory authority over the rates of pipelines certificated under the act. *Lack of such control . . . would offer little governmental protection to consumers of the service or the product.* (Emphasis added.)

2. *Common Carrier Obligations Defined:* One of the most succinct discussions of the duties of a common carrier under the common law appears in this Senate description contained in the legislative history of the Trans-Alaska Pipeline Authorization Act:

> Under common law, common carriers of a particular kind of goods have the duty to receive and transport all such goods tendered to the limit of their capacity and at reasonable rates. If a common carrier lacks the capacity to transport all the goods tendered it, it must transport all shippers without discrimination to the limit of its capacity, and must not unreasonably discriminate among shippers with respect to rates. Operators of common carriers are also required to furnish without discrimination loading and offtake facilities, but this obligation is limited by both custom and reason. Failure of a common carrier to discharge its obligations as such makes it subject to action for damages, and if this remedy is not adequate, to injunctive relief.
>
> Historically, the common carrier obligation of pipelines to accept shipment without unreasonable discrimination has been implemented, where the aggregate of shipments offered for transport exceeds the pipeline's capacity, through the doctrine or principle of 'ratable take.' The principle is that in each shipment cycle—the period for which shipment tenders are considered—the operators must actually accept for shipment the same proportion of each shipper's tenders as the pipeline's capacity bears to the aggregate of all tenders.

The Interstate Commerce Commission has provided the following statement of its jurisdiction:

—Pipelines' duty to provide and furnish transportation upon reasonable request.

—Establishment of reasonable through routes with other such carriers.

—Establishment of just a reasonable rates, fares, charges and classifications.

—Prohibition against subjecting any shipper, locality or territory to any undue or unreasonable prejudice or disadvantage.

—Requirement that every pipeline file with the Commission all rates, charges, classifications, regulations and practices for transportation between all points on its system.

—Prohibition of the demand or collection of any different compensation for transportation than specified in the filed tariff.
—Review of all pipeline rates, and to suspend any rate found to be unjust or unreasonable or unjustly discriminatory or unduly preferential, and to prescribe the just and reasonable rate.

3. *Congressional and ETSI Support:* On October 2, 1975, the general counsel to Energy Transmission Systems, Inc., Paul R. Haerle, wrote to then-Representative Bob Eckhardt, a Member of the Committee on Insular Affairs and a leading Congressional proponent of coal slurry pipeline legislation. Taking note of the Commission's responsibilities and the dimensions of common carrier responsibility, the letter said:

> For all these reasons, it is clear that any coal slurry pipeline of the sort contemplated in the testimony already provided before this Committee must, of necessity, be operated as a common carrier, in the traditional sense of that term, and regulated as to its operations and tariffs by the Interstate Commerce Commission.
>
> You inquired during the course of the discussion in the Committee on this subject . . . as to whether language making specific common carrier status for coal slurry pipelines would be agreeable. As my answer indicated at that time, we would have no problems with the addition of such language.

As noted above, such common-carrier-in-fact requirement was contained in H.R. 1609 in the 95th Congress: it also was incorporated in H.R. 4370 in the 96th Congress.

4. *Current Pipeline Position on Common Carrier Obligations:* ARCO Transportation Company, a 25 percent participant in the ETSI project as recently as the 97th Congress—it has since withdrawn—stated in discussion of H.R. 4230, which had dropped the common carrier obligations for coal slurry pipelines, that there was a need to:

> * * * relieve the ICC of responsibility for determining that tariffs are reasonable since the arms length negotiated contracts between the utilities and the pipeline assure that the rates are reasonable. These rates are also going to be the source of funds for repaying the cost of the line so it is essential that they are not subject to bureaucratic adjustment.

Paul Doran, president of ETSI, testified before this Committee this year that:

> Like eminent domain, the ability to enter into arms-length contracts with coal shippers is essential if pipelines like the ETSI Project are ever to be successfully financed, built and operated.

At another point, discussing the regulatory authority of the ICC, he commented:

> We would, however, have our rates subject to a reasonableness test by the Interstate Commerce Commission any time they may elect to do so, and they could prescribe

> rates for coal slurry pipelines at any time they deemed necessary to do so. *This is inconsistent with the financing obligations that we would need to make in order to obtain the investment moneys to construct these systems.*

Comment: If rate reasonableness, a public interest protection, is inconsistent with the financing exigencies of pipelines, what does that tell the Congress about such pipelines' contribution to the public interest?

5. *Recent Committee Position*: This Committee first dropped the common carrier obligation requirement in H.R. 4230 in the 97th Congress. The Committee report, silent on the issue of common carrier protection, states:

> The bill as reported by the Committee establishes that coal pipelines may enter into contracts for their transportation services and establishes statutory guidelines for those contracts. Other transporters of coal may enter into contracts for their transportation services; hence, conferring upon the pipelines the same ability permits the pipelines to compete with other modes in a similar manner. Moreover, the authority removes any statutory cloud with respect to the pipelines' ability to enter into such contracts, and clarifies the manner is (sic) which they may be entered into.

However, rail carriers respond that even though they now have contracting authority under the Staggers Rail Act, *they still cannot commit their total capacity to contract carriage.* This the pipeline carriers now insist they must do if they are to obtain financing for their facilities. The lack of the protections afforded by common carrier status becomes more serious in combination with other deficiencies in the bill, such as the lack of restrictions limiting common ownership of pipelines, utilities and the coal producers (discussed elsewhere in these views). In fact, a key Congressional supporter of coal slurry legislation strongly attacked a so-called "control" provision in an earlier version precisely on the grounds that adequate protection was assured by that measure's provisions requiring common carrier operation subject to rate review by the ICC.

The contract-vs.-common carrier issue and its relevance to consumer protection is further discussed elsewhere in this report in the portion dealing with the bill's failings with respect to take-or-pay clauses in contracts.

Lack of Effective Rate Regulation

In a sharp break with policies contained in previous coal slurry legislation, H.R. 1010 would effectively eliminate ICC regulation of coal pipeline rates.

Under legislation reported by the Public Works Committee in the 95th and 96th Congresses, coal pipelines would have been common carriers, fully subject to rate and charge regulation by the ICC. Unfortunately, H.R. 1010 does not contain similar provisions.

Instead, H.R. 1010 allows coal pipelines to elect, at their own discretion, to be contract carriers rather than common carriers. There

will be only limited ICC oversight of contracts, and no requirement that rates be "reasonable."

The absence of effective ICC rate regulation is all the more important in light of the fact that the bill does not contain any provisions restricting vertical integration. The Department of Justice has stressed the importance, in the absence of vertical integration controls, of effective rate regulation in combatting the potential evils of common ownership. In testimony before the Public Works Committee, the Department stated:

> As long as this regulation is effective, pipelines will not be able to discriminate against particular shippers, nor will they be able to charge monopoly prices for use of the pipeline.

By restricting ICC authority over pipeline rates, H.R. 1010 opens the door for the abuses described by the Department of Justice.

No Protection From Take-or-Pay Abuses

H.R. 1010 does absolutely nothing to protect consumer utilities served by coal slurry pipelines from being victimized by long-term take-or-pay contracts; on the contrary, it affirmatively encourages such contracts.

The result will be to insulate the pipeline companies and their investors from risk, effectively shifting the risk and attendant costs to the utility consumers and freezing out competition by railroads, in derogation of the competition which this legislation is purportedly intended to stimulate. Ultimately it is the consumer who will lose on both counts.

Our objection to this bill is intensified by an awareness that a number of Members of the Full Committee have co-sponsored legislation to provide relief to natural gas consumers, even to the point of legislatively modifying take-or-pay clauses in existing contracts; a significant number refuse to extend the same protection to utility customers affected by this legislation.

1. *Take-or-Pay Defined*: Take-or-pay clauses in contracts impose on the purchaser an obligation to take a certain minimum percentage of whatever is being purchased under the contracts. The purchaser takes it, or pays for it regardless, hence the term "take-or-pay."

2. *Need for Protection*: These are precisely the types of contract provisions which have obligated natural gas pipelines to continue taking delivery of high-priced natural gas even though much lower-priced gas was available. According to the General Accounting Office, some of these clauses have imposed "take" obligations of 80 to 90 percent of the full volume contacted for under the contract. In one example cited by GAO, several pipelines in a field in southwest Kansas, Oklahoma and Texas reduced their purchase of gas, much of which sold for as little as $0.50 per thousand cubic feet, and instead bought domestic and imported gas at $5.00 or more per thousand cubic feet. In another example, in Appalachia, Columbia Pipeline stopped accepting gas from 21,000 small wells, whose prices were as low as $0.45 per thousand cubic feet, while continu-

ing to buy gas from southwestern producers for up to $8.30 per thousand cubic feet.

The role of take-or-pay contract clauses in the larger scheme of risk-free financing for pipelines was suggested in Senate testimony by Karel V. Fisher, an official of Teknekron, Inc., of Berkeley, California, who has been involved in more than 100 coal related research projects for some 40 client firms. Labeling the process "project financing," he testified: "Project financing would permit the sponsors to separate the credit standing of the project from that of their firms. The creditworthiness of the project would then be evaluated by considering the collateral represented by, first, the physical capital assets, second, the project earning stream, and third, any assurances that might be offered to the investors regarding the recoverability of their investment in the project and their chances for realizing returns on those investments." Take-or-pay contracts, he added, "would basically tie up an awful lot of consumers and remove for 30 years any possibility of competition."

Economist Alfred Kahn, a strong advocate of coal slurry pipelines and a witness on behalf of the several slurry proponents, conceded that, "Customers of electric utility companies are just as captive, just as exposed to the danger that mistaken long-term commitments will be made, when the companies that serve them invest in new, large generating stations as if they enter into long-term contracts for the carriage of coal." (Which invites the response that the utility customer is indeed exposed, and has been suffering from that exposure; one small step that can be taken within the jurisdiction of this Committee and within the confines of this legislation is to assure that the consumer is not victimized by a new application of take-or-pay contract.)

One of the principal arguments for coal slurry pipeline legislation has been to the effect that the pipelines will provide needed competition—or the threat of competition—to railroads. If one assumes for the purpose of argument that this is true, take-or-pay contracts are anticompetitive. Proponents of this legislation frequently cite the case of a coal pipeline running from Cadiz, Ohio, to a utility on Lake Erie near Cleveland, which operated in the late 1950's and early 1960's until unit trains were instituted and undercut the pipeline, putting it out of business. The critical point to remember, however, is that the pipeline was not operating on the basis of a take-or-pay contracting arrangement. If it had, it is altogether likely that the line would still be in operation, resulting in higher transportation costs ultimately paid by the consumer of the utility served.

Direct impact on the consumer aside, long-term take-or-pay contracts also freeze out competition by railroads or other forms of transportation over the decades of their duration. If railroads are able to achieve operating economies through investment, innovation or administrative efficiencies, their ability to compete would nonetheless be foreclosed. In fact, utilities would be denied choice, over the life of the contract, in such matters as alternative forms of fuel, alternative sources of fuel, and alternative forms of transportation.

Demand for electricity produced by coal-fired generators has not kept pace with productions, a fact which has prompted more than

one utility company in the West to pull out of a coal slurry pipeline venture. If legislation similar to the Committee-reported bill had been enacted during the mid-1970's, it is clear that a number of pipeline ventures would have been launched, at least to the point of having negotiated their contracts. The contracting utilities today would be stuck with requirements for higher volumes of coal than they could use.

Another proponent of this legislation, Paul Rodgers, Administrative Director and General Counsel to the National Association of Regulatory Utility Commissioners, testified in this regard:

> We at the NARUC have viewed with alarm the problems that have been created in the natural gas market through long-term contracts with onerous take-or-pay provisions, indefinite price escalators * * * We believe that any legislation should contain some means for contract review to help protect utilities from troublesome long-term contract provisions.

3. *Rebuttal to Arguments of Slurry Proponents:* Opponents of take-or-pay limitations argue that the ICC review of contracts provided in this legislation should put aside any concern in that regard. We disagree. For one thing, the ICC has virtually ignored the contract arrangement of the one position now in operation, Black Mesa, which is owned by Southern Pacific. Also, the Commission generally favors coal slurry pipelines, according to testimony by Chairman Reese Taylor. Asked during hearings how the ICC would respond to take-or-pay contract proposals, he responded:

> Gosh, that's hard to say because it would depend on the contracts to the Commission and where we were with them. I certainly think that would be something we would have to take into account. I think it would depend on whether you had a take-or-pay prohibition in your coal slurry legislation.

Those who oppose any limitation on take-or-pay contracts insist that such restrictions are necessary to assure the financing, as ETSI President Carl Doran has testified. Yet we find it curious that no such contracting latitude is provided in legislation reported out by this Committee in the 95th and 96th Congresses. And we reject out of hand the notion that the consumer must somehow bear all the risk if the financial community considers these projects speculative at best. Some of the likely participants in these pipelines are major enterprises with assets, access to capital and extensive experience in the energy and transportation industries. Current participants in ETSI include Bechtel, Texas Eastern, KN Energy Inc., and InterNorth. InterNorth, to elaborate on one participant, is a diversified, energy-based corporation involved in natural gas, liquid fuels, petrochemicals and production, with 11,000 employees in this country and abroad. The TRANSCO/VEPCO proposed pipeline consists of a major energy firm and the 11th largest utility in the country, according to a witness for the joint venture.

Another argument of take-or-pay advocates is that there is no similarity between the natural gas industry and the coal industry, that it is "apples and oranges" to suggest that take-or-pay could

cause a problem in the coal pipeline industry. It is said in this connection that it is "unprecedented" to advocate take-or-pay limitations in a transportation context.

We recognize that there is a considerable difference between the natural gas and coal industries; in the former, the pipeline typically is the purchaser of the energy and it is between the pipeline and the producer that the take-or-pay relationship arises. Yet the principle is the same. We find it ironic that those who stress the differences would object to any proposal to place "unprecedented" limitations on transportation take-or-pay contracts which we believe to be necessary precisely to accommodate the differences between the two industries.

Another opposition argument suggests that nothing like 30-year take-or-pay contracts are in the offering. Various witnesses have stated on the House or Senate sides that 10 to 15 years is the more likely duration.

The response, inevitably, is that no one knows precisely what contract provisions are being negotiated. David A. Skedgell, former Executive Director of the Coal Slurry Transport Association, declared flatly in a statement to the ICC last year that, "Coal slurry pipeline sponsors intend to execute long-term (20–30 year) throughput agreements with electric utilities or other large industrial users on a take-or-pay basis. Such contracts would then form the basis for financing the project." Moreover, a letter of intent submitted by ETSI to the City of Wichita, Kansas, in 1976 contained the following statements: "The firm take-or-pay transportation agreements will require that each shipper pay the tariff even though coal is not actually available for transportation or (sic) coal and/or water cannot be received or utilized by shipper at the destination point. . . . The term of the transportation contract will be 30 years. . . . In the event this supply of water becomes unavailable, after completion of the pipeline, ETSI will develop a solution and perform the actions necessary to provide a water supply. ETSI will recover the net capital and operating costs thereof as a surcharge addition to the tariff rate, to include a return on equity of 15%." ETSI disclaims any such contracting intent at present. But the company refuses to respond to general questions covering: The number of utilities which have signed long-term contracts with the pipeline and their identities; the reasons for any refusals to do so; the number of negotiations at the letter-of-intent state, the number of contracts or letters-of-intent containing take-or-pay provisions; whether exceptions are made; the nature of cost-escalator provisions in contracts; and the pipeline's obligations in the event its water supply is terminated or reduced.

4. *Conclusion:* Coal slurry pipeline legislation has been proposed on and off for decades and has been before this Committee since the 95th Congress. ETSI has been active for at least a decade in promoting its project and has supported various versions of the legislation. The contracting provision which would permit take-or-pay contracts has been inserted in the legislation only in recent years. To us, this suggests that such provisions are not essential but are an unjustified bonus to the slurry companies. If they are necessary, it is only because such companies are unwilling or unable to obtain their financing without shifting the burdens of cost and risk to the

public. This is not true competition. It is a governmentally-sanctioned anticompetitive practice.

Lack of Construction Overrun Protection

H.R. 1010 provides no protection for the consumer from pass-throughs of construction cost overruns in the form of higher utility rates.

In 1975, the cost of the ETSI Pipeline was estimated to be $750 million. Six years later, in 1981, that cost had increased more than 200 percent to $1.8 billion, and this year in response to written questions the ETSI Pipeline placed the construction costs at $3.8 billion. There are other examples of pipeline cost overruns in projects where there has been Federal involvement, such as the Alyeska Pipeline which originally was estimated to cost $800 million and skyrocketed to $9 billion, and the Alaska-Canada Natural Gas Pipeline which has soared from estimates of $10 billion to $40 billion.

How will the pipeline company and its investors compensate for such an increase in costs? The Office of Technology Assessment has cautioned that "the costs of errors in judgment will probably be borne largely by the public and not necessarily by the utility investors . . . ."

Are there any protections in this legislation for the consumer? Paul Doran, President of ETSI, was asked what protections there are in H.R. 1010 for the consumers? He answered:

> The type of contract contemplated would provide a rate schedule to the shipper covering the pipeline's anticipated operating expense, depreciation, debt coverage, taxes and reasonable return on employed capital on the basis of the *expected* capital cost of the facility. (emphasis added)

A simple answer would have been there are no protections for the consumer in H.R. 1010.

In answer to another question regarding whether ETSI would object to a provision protecting consumers, he stated his position more plainly:

> ETSI intends to include costs of construction in its rate structure which will be contained in the rate charged as coal is delivered from the pipe.

This blatant disregard for the protection of the consumer should not be ignored. The American taxpayer and electric power consumer should not have to face astronomical rates generated by cost overruns of a project, particularly a project receiving the special privilege of Federal eminent domain authority.

Support for correcting this gross deficiency in H.R. 1010 has come from some unlikely sources such as Alfred Kahn and James Crawford. Alfred Kahn, the Carter Administration's inflation fighter, testified in support of the bill but also said:

> I would want to see the incorporation (in this legislation) of some incentives for cost controls * * *.

James Crawford, Vice Chairman of the Slurry Transport Association's Board of Directors, was asked in Senate hearings who would pay for a construction cost overrun:

> It * * * would be incurred by the partnership, in our case, our partnership that was building the pipeline * * * it would be a cost that would be borne by the stockholders of TRANSCO and the stockholders of VEPCO. (Note: Mr. Crawford is President of TRANSCO which is in equal partnership with VEPCO (a utility) to build a slurry pipeline in southern Virginia.)

An amendment to do exactly what Mr. Kahn and Mr. Crawford thought appropriate was presented to the Committee but rejected with little or no discussion by the slurry proponents. One can only conclude that any cost overrun will be the burden of the consumer. There is nothing in H.R. 1010 to prevent such an occurrence.

No Protection Against Interlocking Ownership Arrangements

H.R. 1010 does not contain any "control" provision to restrict vertical integration, and thus does not contain adequate protection against discrimination and monopoly profits that may result from interlocking ownership arrangements between coal slurry pipelines and coal suppliers and users.

"Control" provisions are designed to separage control of coal slurry pipelines from control of the companies whose coal would be shipped through the pipelines—both at the coal shipping end (i.e., coal suppliers) and the user end (i.e., electric utilities, factories, etc.). This is normally accomplished by prohibiting any user of a pipeline (whether mine, factory, or utility) from owning more than a specified percentage of the coal slurry pipeline.

The purpose of any control provision is to promote competition and to try to eliminate monopolistic practices, restraint of trade, and discrimination that may result from common ownership, i.e, vertical integration, of the pipeline and coal suppliers and users. Equally important, control provisions are intended to prevent serious anticompetitive situations from developing rather than trying to deal with such situations after the fact, when corrective action poses much greater obstacles.

The need to impose control restrictions on coal slurry pipelines has long been recognized. Coal slurry legislation reported by both the Committee on Interior and Insular Affairs and the Committee on Public Works and Transportation in the 95th and 96th Congresses contained control provisions. Moreover, the substantial weight of the testimony over the past three Congresses has favored inclusion of a control provision. In fact, control provisions not only have been supported by some of the proponents of coal slurry legislation, but have received remarkably little criticism, even from coal slurry interests themselves.

Therefore, in the context of this legislation, we believe that a control provision applicable to both the user end and the coal shipping end of the pipeline is essential in order to protect the consuming public from discrimination and monopoly profits made possible by vertical integration. Among other things, H.R. 1010 extends to

coal slurry pipelines the special privilege of Federal eminent domain authority, eliminates the requirement that coal slurry pipelines be common carriers, restricts ICC involvement in the rate-setting process, and permits coal slurry pipelines to enter into long-term contracts containing take-or-pay provisions and indefinite cost escalators. Under these circumstances, we feel it is entirely appropriate to impose special restrictions on vertical integration in order to protect the public.

1. *Potential adverse consequences of vertical integration by coal slurry pipelines.*—H.R. 1010 does not contain a "control" provision and, therefore, permits vertical integration. For example, under H.R. 1010, the pipeline could be owned by the coal suppliers who will ship their coal through the pipeline, by the coal users who will purchase the coal shipped through the pipeline, or by a combination of both coal suppliers and users.

One potential adverse consequence of vertical integration is the elimination of certain flexibilities provided by the market place. In some situations, the market may be more efficient than vertical integration. Take, for example, the situation where a railroad offers to transport coal at a lower rate than is being offered by the pipeline. Under these circumstances, an electric utility would normally ship by rail rather than pipeline. However, if the utility owns a significant portion of the pipeline, it would have an incentive to transport its coal through its own pipeline, even if the railroads could transport the coal at a lower cost. Certainly, the utility will want to protect the large sums of money it invests in the coal slurry pipeline. And certainly, these increased costs will ultimately be passed on to the consumer.

Another potential adverse consequence of vertical integration relates to the cozy business relationships that can develop in situations of common ownership. There would be no assurance of arm's length negotiations between utility, pipeline and producer of coal, and there would be less incentive for seeking economies in choosing the coal source, mode of transportation, or in the construction of the pipeline. Of course, any cost increases arising from common control or ownership could well be passed on to the utilities' "captive" consumers.

A third set of potential adverse consequences relates to the situation in which a coal supplier that sells or intends to sell coal in the relevant downstream market also owns or controls a coal slurry pipeline. Such a pipeline owner may have an incentive to build a smaller diameter pipeline with fewer pumping stations that would a pipeline owner that did not own the coal it shipped. This situation would tend to limit the amount of coal going through the pipeline and thereby available downstream. Such a restriction in supply would tend to drive up the price of coal to the benefit of coal sellers in the relevant downstream market, including the coal seller who owns the pipeline.

In testimony before our Committee during the 96th Congress, the Department of Justice recognized this situation to be "a significant antitrust problem." The Department went on to recommend that the control provisions in the bill relating to coal suppliers be substantially strengthened.

A final class of potential adverse consequences associated with vertical integration is relevant only in a rather special case, that of vertical integration by a regulated monopoly, e.g., an electric utility. In such a case, vertical integration may offer a means of circumventing rate regulation.

Electric utilities are normally monopolies and, as such, are granted exclusive franchises by government authorities to provide electricity. Since the monopoly utility would not be restrained by the discipline of competition, it could restrict the output of electricity and raise its prices above the competitive level. Thus, the cost advantages of a single producer and distributor of electricity might not be realized by consumers. To attempt to mitigate these effects, electric utility rates are subject to direct regulation. Ideally, rates are set at a level that just permits recovery of all prudently incurred costs, and a reasonable rate of return for investors. This will force rates down to those that would prevail if competition were available to serve as a check on excessive profits and remove the incentive to restrict output.

The vertical integration of electric utilities into coal slurry pipelines, however, may provide an opportunity to evade the effects of rate-of-return regulation. If a utility's electric generating operations are subject to rate-of-return regulation, but no effective check exists over the price the utility pays for transportation by its own pipeline operations, then the utility would be able to achieve the profits denied to it by rate-of-return regulation. The utility could inflate the price charged for its own transportation above a competitive level. This would raise the accounting costs of the regulated part of the utility, and permit a higher price to be charged either through a rate redetermination or through an automatic cost adjustment mechanism. However, these additional "costs" to the regulated operations would be additional profits to the firm's pipeline operation and the firm as a whole. Potentialy, the utility could achieve a price of electricity, and profit from electricity, equivalent to that of an unregulated electric utility. Of course, the big loser would be the consumer.

In testimony before our Committee, during the 96th Congress, the Department of Justice indicated that it was not too worried about this problem. The reason that the Department gave for not being worried is as follows:

> Under H.R. 4370 and H.R. 4632, the Interstate Commerce Commission will regulate rates and ensure that pipelines fulfill their common carrier obligations. As long as this regulation is effective, pipelines willnot be able to discriminate against particular shippers, nor will they be able to charge monopoly prices for use of the pipeline. Thus, we do not see competitive problems arising from discrimination or monopoly pricing in pipeline use.

The situation is, however, quite different under H.R. 1010, as reported. The ICC will not regulate rates. And the ICC will not ensure that pipelines fulfill their common carrier obligations. Under H.R. 1010, the pipeline may elect, at its own discretion, to be a contract carrier rather than a common carrier. There will be

only limited ICC oversight of contracts, and no requirement that rates be "resaonble."

The potential adverse consequences of vertical integration with respect to electric utilities is further compounded by the fact that the utility industry has been constantly increasing the amount of coal reserves owned and controlled by individual utilities. This is called "captive coal".

Some years ago Congress ordered the Department of Energy to make regular studies and reports on the quantity of captive coal owned by the utility industry. In its report, "Coal Competition: Prospects for the 1980's," January 1, 1981, the Department of Energy stated:

> Captive coal is an instance of a natural monopolist, the electric utility, vertically integrating into an intermediate product stage, the production of coal, for use in the generation of electric power.
>
> In the last 15 years captive coal has been rapidly increasing in importance as a source of fuel for the electric utilities. In 1956, 13.4 million tons, or about 5.5 percent of all coal used by electric utilities came from captive mines. In 1978, captive coal deliveries totalled 67 million tons, or 14 percent of toal coal deliveries to the electric utilities. Captive coal production is projected to reach 143 million tons by 1985, which will account for about 20 percent of the projected 1985 total utility coal consumption of 733 million tons.

The June, 1977 staff report by the Bureau of Power of the Federal Power Commission entitled "Electric Utilities Captive Coal Operations" states:

> A survey of the electric utilities which presently control coal reserves has indicated that captive coal production will triple from 1975 to 1985, reaching up to 145.1 million tons per year. Most of this increased production will come from the utilities operating captive mines in 1975. Twelve new utilities are planning coal production at this time.
>
> The 145.1 million tons of captive coal production planned for 1985 would be 18.8 percent of the projected 770 million tons of coal to be consumed by the electric utilities in 1985. It is reasonable to assume that some utilities which do not have coal operations at this time will acquire and develop coal reserves in the interim, or purchase coal mines which are already in operation. This would give captive coal an even greater share of the coal supply for the electric utility industry as a whole than indicated by the survey.

The concentration of ownership of large reserves in a relatively few utilities could well result in a significant lessening of competition in the coal industry, especially when the utilities that own or control the coal also own or control the pipelines used to ship the coal.

These are just some of the problems which could occur under H.R. 1010 if coal suppliers and users are allowed to own or control

(or be owned by or be controlled by) coal slurry pipelines in the absence of effective common carrier obligations and rate regulation. All of this can have nothing but anticompetitive effects, all to the detriment of the consumers in this country.

2. *Previous coal slurry pipeline legislation contained "control" provisions.*—The need to impose control restrictions on coal slurry pipelines has bene recognized by prior Congresses.

In the 95th Congress, the bill reported by the Committee on Interior and Insular Affairs contained a provision which prohibited the issuance of a certificate to any pipeline which is controlled by a person who uses or will use the coal transported by the pipeline. The "control" definition, which governed the scope of the restrictions on vertical integration, was defined as "the power to exercise control by whatever means; and any person who (1) is a director of a carrier or of any other person, or (2) owns in excess of 5 per centum of the voting stock (or any like evidence of participation) shall be deemed to have the power to exercise control."

The bill reported in the 95th Congress by the Committee on Public Works and Transportation also contained a "control" provision. The provision was similar to the provision in the Interior Committee bill, except that the ownership restriction was set at 35 percent instead of 5 percent.

In the 96th Congress, the bill reported by the Interior Committee again contrained a control provision. This provision was described in the Committee report (House Rpt. 96-692, Part 1) as follows:

> The committee amendment contains provisions which restrict interlocking ownership arrangements permitted between certified pipelines and coal suppliers and users. These provisions are designed to provide enough flexibility to permit the financing of new coal pipeline ventures while preventing the domination of the projects by interlocking interests to the detriment of other shippers and consumers.
>
> * * * * *
>
> Therefore, the committee bill established a more workable three-tiered test of control (Section 201(3)): Control is the power to direct the management and policies of a company through ownership of a controlling interest. Ownership of 50 percent or more of a company in controlling interest is per se control; ownership of between 33⅓ and 50 percent is a prima facie showing of control; and ownership of 33⅓ percent or less is a prima facie showing of the absence of control. Under this provision, any company can be found to control another, no matter what its percentage of ownership. The percentage figures are merely benchmarks at which the burden of proof in determining control shifts. Thus, anyone owning one-half or more of another company controls that company. A person owning more than one-third or less of another, he presumably does not control that company, unless a challenging party proves the contrary.
>
> * * * * *

> It is essential that coal slurry pipelines which receive the special benefit of federal eminent domain authority operate in the public interest as common carrier pipelines. Thus, the committee designed the control restrictions in its amendment to prevent situations in which a coal supplier or coal user so dominates a coal slurry pipeline company that the pipeline is motivated to discriminate against other suppliers or users. The committee further intends to preclude the possibility of a supplier or user who dominates a pipeline being motivated to adjust pipeline rates to offset losses in the integrated operations of the company.

The bill reported by the Committee on Public Works and Transportation in the 96th Congress also contained a "control" provision imposing restrictions on ownership of the pipeline.

In keeping with our view that this legislation has not improved over the years, it must be noted that a control provision was not included in the bills reported during the 97th Congress. However, in our view, this was just another indication of the special interest nature of this legislation.

3. *Testimony supports need for "control" provision.*—The hearing record, developed over a number of years, clearly supports the need for including a "control" provision in coal slurry legislation. In fact, "control" provisions have often been supported by coal slurry proponents.

For example, Congressman Bob Eckhardt, in testimony on Coal Slurry legislation in the 95th Congress, the Coal Pipeline Act of 1977, before the Joint Subcommittee on Mines and Mining and Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, stated:

> The legislation includes a commodities clause which prohibits vertical integration. Thus, a carrier granted the power of eminent domain cannot transport any coal which it has mined, and a certificate of convenience and necessity may not be issued to a carrier which controls or is controlled by a utility or other coal user. The Coal Pipeline Act will therefore *prevent* serious anticompetitive situations from developing rather than trying to deal with such situations after the fact when corrective action poses much greater obstacles. (emphasis in original)

Mr. Eckhardt, a strong proponent of coal slurry legislation, further stated during the Interior Committee hearings:

> We have also provided here very carefully that coal carriers could not be interlocking with the owners of coal and the purchasers of coal which makes for a cozy relationship and in which other interests could be frozen out.

In supporting coal slurry pipeline legislation during the 95th Congress, the Department of Transportation not only testified in favor of a "control" provision, but recommended that it be expanded to cover non-certificated pipelines as well as certificated pipelines.

The Interstate Commerce Commission, again in the 95th Congress, testified before the Committee on Public Works and Transportation as follows:

> "We strongly endorse the application of the commodity clause to slurry pipelines.

In commenting on proposed coal slurry legislation in the 95th Congress, the Federal Trade Commission, in a letter to the Committee on Interior and Insular Affairs, stated:

> The provisions of the bill which prohibit the owners of a coal slurry pipeline from having an interest in the coal which is transported in the line are wisely intended to insure fair and non-discriminatory treatment of all coal shipped in the pipeline, and to provide an incentive for maximum utilization and any necessary future expansion of the facility. The Commission supports this objective * * *.

In the 96th Congress the Department of justice testified concerning antitrust problems which can arise in connection with coal slurry pipelines and made recommendations for dealing with those potential problems. The Department pointed out that "vertical integration, the ownership or control of successive stages of a manufacturing and distribution process, has been a major concern in antitrust enforcement for years."

Those bills of the 96th Congress contained "control" provisions designed to separate control of coal pipelines from control of the companies whose coal would be shipped through the pipelines. The Department of justice supported those control provisions as "part of a long history of efforts to limit the potential for discrimination and monopoly profits that, under certain circumstances, may accompany vertical integration."

Those 96th Congress bills also contained provisions requiring coal slurry pipelines to operate as common carriers and requiring the ICC to regulate them as common carriers, including their rates. The Department of Justice viewed these ICC regulatory provisions as effective regulatory means of avoiding monopoly prices for pipeline use by end users and discrimination among end users because "the ICC has the power in administering the common carrier obligation to order that capacity be made available to shippers on a nondiscriminatory basis" and "it (the ICC) can force reasonable rate of return."

It should be noted that H.R. 1010 contains neither the common carrier requirement nor the ICC regulation provisions found in the 96th Congress' bills. Therefore, H.R. 1010 contains no protection against monopoly prices for pipeline use by end users and no protection against discrimination among users of the pipelines.

The Justice Department said there are significant antitrust problems if a company which sells coal owns or controls a pipeline and that there must be a control provision in legislation of that type. The Department emphasized that the important issue is the definition of "control" because "the operation of the vertical integration restriction will largely depend on the scope of the definition of control." The Department concluded that to be realistic the control

standard should be "5 percent of the voting stock." In other words, for antitrust purposes, one person or corporation "controls" another corporation if the stock owned amounts to 5 percent of the voting stock of that other corporation.

In testimony before the House Public Works Committee in the 96th Congress, Dr. Kenneth Lay, President of Continental Resources Company and Chairman of the Board of the Slurry Transport Association, made the following statement with respect to the control provisions contained in the legislation as reported by the Interior Committee:

> Second, the Interior Committee revised the provisions regulating the relationship between the pipeline and the companies using its service. This provision is sometimes inappropriately called the commodities clause. This issue has clouded the merits of coal pipelines for too long. The new compromise adopted by the Interior Committee preserves the independence of the pipeline from interests that may have conflicting economic concerns but allows those entities most interested in the construction of a pipeline to participate in financing such a project.

It is important to note that Dr. Lay, who represented the coal slurry pipeline industry did not testify in opposition to a "control" provision. In fact, his testimony acknowledges that certain interests "may have conflicting economic concerns" from the pipelines.

In the 97th Congress, Dr. Alfred Kahn, a supporter of coal slurry pipeline legislation, conceded that vertical integration involving a utility company could pose a threat to rate payers, permitting the company to charge its utility operations a transfer price containing a monopolistic surcharge, thereby effectively circumventing regulation.

Also noteworthy is the fact that there is very little testimony in the 95th, 96th, or 97th Congresses in opposition to "control" provisions.

4. *Conclusion.*—In conclusion, one of the reasons that we oppose H.R. 1010 is that it does not contain provisions protecting the consumer from the potential abuses of vertical integration.

Inadequate Protection Against Construction Work in Progress Requirement

H.R. 1010 contains no adequate protection of the consumer against the dangers of being required to pay in advance for a pipeline which may never be completed.

Unlike other issues on which proponents and opponents of this legislation disagree, a prohibition against pass-through of payments for what is known as construction work in progress (CWIP) has considerable by-partisan support on the Committee. The problem lies not so much with intent as with the actual effect of language contained in the bill.

During markup of this legislation in the Subcommittee on Surface Transportation, an amendment was adopted by voice vote, specifying that a pipeline carrier certificated under the legislation shall not, "through use of a tariff or otherwise, require any of its

electric utility customers to pay, at any time prior to the operation of the coal pipeline . . . a fee, surcharge, or other payment relating to such pipeline."

This language was adopted after debate highlighting the fact that there is no guarantee that a given pipeline will prove cost-effective, or even be placed in operation. The consumer should not be expected to pay in advance for a project that might fail—as in the case of several nuclear projects abandoned after expenditure of perhaps hundreds of millions of dollars. A further rationale is that those who stand to profit from the pipeline facility should make the investment and bear the risk.

There are two apparent problems with the language. First, if a utility is to be a part owner of a pipeline company—which is not prohibited by this legislation—it might be able to pass through construction costs such as loan payments by arguing that this section only prohibits pipelines from contractually requiring the utilities it will be serving to make payments to the pipeline prior to completion of the pipeline. A utility incurring construction costs as an owner of a pipeline could pass these costs to its customers apart from any supplier-purchaser relationship between the pipeline and the utility. There also is some question as to whether the use of the term "require" would cover a voluntary payment of construction work in progress by the utility to the pipeline under a contractual relationship; in such a case, the contract rather than the pipeline could be construed to "require" the payment, in which case the prohibition would not apply.

Part of the problem stems from the focus of the prohibition on the pipeline rather than the utility so as to avoid directly affecting rates charged by public utilities to their customers, which might have exceeded the Committee's jurisdiction. There is considerable sentiment among the sponsor of the amendment and others that the construction work in progress prohibition should be refined by floor amendment. It would, in our view, make clear that the utility could not commence recovery of any investment in a pipleine before completion of its construction and the start of the delivery of coal.

Increased Rail Rates for Other Commodities

We are concerned that coal slurry pipeline interests, armed with Federal eminent domain authority and other benefits conferred by this legislation, may establish a network of slurry pipelines capable of siphoning off a large portion of the rail industry's most important commodity. It has been estimated that proposed coal slurry pipelines would have an aggregate annual capacity up to 250 million tons of domestic coal. This represents approximately one-half of all the coal currently handled by U.S. railroads. The coal sought for diversion by pipelines proponents is the most lucrative coal traffic, the high-volume, long-distance movements which rail unit trains can handle efficiently.

By focusing on this market, pipeline operators, immune from common carrier obligations imposed upon other forms of transportation, including rails, will be in a preferential competitive position. On the other hand, this will result in the railroads' fixed costs

such as debt service, property taxes, roadbed maintenance, repair and other constant expenses, being spread over a smaller number of shippers, resulting in increased rail costs to those shippers.

The President of the Association of American Railroads, William Dempsey testified:

> The impact on railroads and on the shippers and communities depending on them are predictable and quantifiable. Those coal customers left to the railroads will face higher rates because there will be fewer units of traffic over which rails may spread their fixed costs. Since there are practicable limits on how much coal rates can be increased without putting producers out of business, rates on other rail-carried commodities will rise as well.

Similar reservations have been expressed by a coalition of farm groups concerned with the effect coal slurry pipelines will have on farm-related commodities such as grain, grain mill products, food, lumber and wood products, paper, fertilizer, chemicals and petroleum. A representative of the farming community, testifying before a Senate subcommittee, summarized the view of many shippers, particularly farmers, by stating, "with substantially less coal, railroads will certainly have to charge more to ship farm products, and those increased costs will be passed on to supermarket customers."

Perhaps the strongest indictment of coal slurry impact upon other commodities moved by rail was made by Robert Blanchette, former Administrator of the Federal Railroad Administration. In 1982, he unequivocally stated that when railroads suffer, the agricultural community's shipment of bulk commodities are the most likely to feel rate repercussions. If coal slurry pipelines are afforded the special interest privileges contained in this legislation and are ultimately built, rail rates "will be higher than a cat's back," according to Mr. Blanchette.

We do not believe that the majority of American consumers are ready to absorb anticipated rail increases in prospect for other commodities should pipelines be constructed. The dubious benefits promised by pipeline promoters will certainly end up costing the majority of the American public in a myriad of ways, including higher rail rates for other commodities.

Loss of Permanent Jobs

H.R. 1010 will result in a significant loss of permanent jobs.

This legislation will result in a net loss of permanent jobs at the expense of creating short-term temporary construction jobs.

Railroad employment has plummeted 25 percent from 514,000 in July 1981 to 388,000 in January 1983. The Office of Technology Assessment estimataed that 5 pipelines would cost 16,000 rail jobs. Extrapolating these figures to the present proposed construction of 13 coal slurry pipelines, 39,000 permanent rail jobs will be lost.

Slurry proponents, utilizing the Bureau of Labor Statistics (BLS) methodology, predict the creation of 100,000 temporary construction jobs for five years. using the same methodology, after construction of the pipeline 22,000 permanent jobs would be created. Absent these pipelines, it is estimated using the BLS methodology, that

93,000 permanent rail jobs would be created with increased rail traffic and resultant increases in rail equipment manufacturing industries. Thus, with the passage of this legislation, it can be concluded that a net loss of 71,000 permanent jobs will be the unfortunate result.

Along with the loss of railroad jobs, the Railroad Retirement System now supporting thousands of rail retirees will be placed in jeopardy. This legislation will most assuredly counteract any additional revenue or benefit savings created by legislation presently moving through Congress to save the rail retirement system. The rail worker and retiree will be the chief victims of this jobs destruction measure.

Unwise Delegation of Federal Condemnation Authority

H.R. 1010 unwisely delegates the Federal power of eminent domain to private corporations that will not serve as common carriers and, therefore, will not necessarily serve a public use.

The United States possesses the power of eminent domain, an inherent and essential power of sovereignty. Congress, on behalf of the Federal Government, may delegate the right of eminent domain to private corporations which, although their business is pursued for profit, yet stand in such a relation to the public that they may be considered as promoting the public convenience, or discharging a public office or duty, or carrying on works which are of general public utility.

It is established beyond question that private property can constitutionally be taken by eminent domain only for a public use. This limitation derives from the provisions of the Fifth Amendment that, "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In determining whether a given "use" of property is a "public use" in the constitutional sense, the courts take a very broad view and give great deference to the Congressional declaration of public purpose. Notwithstanding the broad definition of "public use," the power of eminent domain cannot be exercised for the benefit of a select few. A respected authority on Constitutional law summarizes the law on this point as follows:

> * * * the general public must have a right to resort to the property acquired by condemnation, or to demand the service of the company, not as a mere favor, or by the permission or consent of the company, but as a right, and the property must be impressed with such a public use as will bring and keep it within the regulation and control of the legislature. But the "public", in this sense, need not include the entire population of the state or community; the requirement of a public use being satisfied if the right to resort to the property or employ the service of the company is common, that is, equally available to all those, without discrimination, who desire to enjoy its advantages and will pay the reasonable and proper charges.

Thus, railroad companies, carrying on the general business of common carriers of passengers and freight, have been found to unquestionably serve a public use sufficient to justify the delegation of the power of eminent domain for their necessary purposes. But a branch or spur track or siding, constructed for the sole purpose of carrying the project of a single mine or factory, has not been found to serve a public purpose.

It is against this background that Congress must decide whether a delegation of Federal eminent domain authority to coal slurry pipelines is justified. We have concluded that it is not justified, at least under the provisions of H.R. 1010, as reported.

We base our conclusions with respect to H.R. 1010 on several points; (1) coal slurry pipelines would not be common carriers; they could elect, at their own discretion, to be contract carriers, serving as little as one customer; (2) the end users served by the pipeline may not be electric utilities serving the public; they might simply be factories using coal for their own private business purposes; (3) the ICC does not have to make a case-by-case finding that the pipeline will serve a beneficial public use; (4) nothing in H.R. 1010 prevents a private company (e.g., a steel plant) from building its own pipeline, even though there would not be any benefit to the general public.

Stated simply, we do not believe that H.R. 1010 has been drafted in such a way as to ensure that the coal slurry pipelines will serve a public use in each and every instance. Under these circumstances, we must oppose this broad grant of Federal eminent domain authority.

The Administration Opposes This Legislation

H.R. 1010 is opposed by the Administration.

President Ronald Reagan in a memorandum dated November 16, 1981 stated that coal slurry pipelines "should be allowed to compete on their own merits as contributors to improving America's energy situation." He went on to say, "I recognize that there may be significant problems in right-of-way acquisition. However, this Administration will not support legislation which has been introduced in Congress to provide a federal right of eminent domain to override these difficulties."

That opposition in the 97th Congress has remained intact for the 98th Congress. In a letter from the Office of Management and Budget dated April 14, 1983, the Administration's position was clearly stated: "The Administration's position to oppose the extension of Federal eminent domain authority to coal slurry pipelines is unchanged from the last Congress. We do not think it is appropriate to support legislation that provides a Federal right of eminent domain to override the difficulties in acquiring rights-of-way because we continue to believe that such decisions can and should be made by the State involved."

Environmental Protections Weakened

H.R. 1010 weakens environmental protections, thereby conferring a special interest windfall on slurry operators.

Despite hollow reassurances to the contrary, H.R. 1010 contains less environmental protection than in previous versions of this legislation. One deliberate, particularly glaring omission is the lack of any provision mandating the United States Geological Survey to conduct a study of potential impacts of coal slurry pipelines on water taken from underground aquifers located in the West and Midwest, areas of the country particularly sensitive to groundwater depletion problems. Previous legislation required the United States Geological Survey to determine that construction and operation of a pipeline would not cause a significant adverse impact on the quality or quantity of the water table in surrounding areas. The clear intent of this language was to limit the use of groundwater for coal slurry pipelines to those areas that were not in danger of being depleted. It is interesting to note that this protection against overdrafting to satisfy a new special interest water use was contained in H.R. 1609, as reported from the Interior Committee in 1978. Such a requirement would not make H.R. 1010 unworkable but would provide important precautionary language preventing coal slurry pipeline construction and operation in water scarce areas of the country should the United States Geological Survey find a groundwater problem of significant magnitude to merit such action. The present bill does not contain this meaningful form of protection.

Previous legislation also required each certificate of public convenience and necessity issued by the ICC for construction of a pipeline to contain terms and conditions to control or prevent damage to scenic and aesthetic values, as well as to fish and wildlife habitats. Moreover, this earlier provision, contained in the reported version of H.R. 4370 in the 96th Congress, called for terms and conditions in a certificate to ". . . otherwise protect the environment from adverse effects associated with construction, operation, or maintenance of such coal pipeline. . ." Similar language is missing in this bill, raising the spectre that these aspects of environmental protection might be overlooked.

We also take issue with other terms or conditions left out of H.R. 1010. For example, an earlier bill conditioned a certificate on compliance with applicable Federal or State law dealing with air and water quality standards. Protections were contained in previous versions of this legislation to safeguard the interests of individuals living in the general area of a pipeline who rely on the resources of that area, as well as directing the ICC, prior to certification, to require the location of a coal pipeline along a route that will take into account the least damage to environment, economic and technical feasibility factors. H.R. 1010 contains none of these specific safeguards.

As with other sections of this legislation, special interest considerations have prevailed over important environmental safeguards contained in earlier drafts of this bill. We object to the way proponents have run roughshod over this precedent and concur with many major environmental organizations that, a reported, this legislation does not adequately protect environmental concerns.

Water Quality Risks

H.R. 1010 is not based on any reasonable assurances, sound research, or comprehensive study that the effluent water from the pipeline is environmentally safe.

There was no persuasive evidence presented to our Committee that in any way provided assurances that the water expelled at the end of a coal slurry pipeline is safe for the environment, let alone human beings. This fact was confirmed when the Sierra Club testified before our Committee:

> The Sierra Club is concerned about the quality of the effluent water for coal slurry operation because there seems to be conflicting and a lack of scientific information available on the potential environmental impacts of the leachates and additives in the effluent water.

EPA has completed one minor study and is in the process of preparing two others. One study was completed in 1979 which simply attempted to point out the environmental problems in the design, construction and operation of the pipeline system.

The second study has not been completed but is devoted to the description and characterization of the potential environmental contaminants.

The third study is the most relevant since it is only in the planning stage and would characterize metals and organic quality of substances in the effluent and the potential presence of trihalomethane precursors.

Don Ehreth, Director of the EPA Office of Environmental Engineering and Technology, said in the Committee's hearings that further study is needed of the leaching of organic compounds from the coal into the transport water. He went on to say, ". . . if the water is subsequently chlorinated to disinfect it . . . it is potentially possible that various chlorinated hydrocarbons, many of which are suspected carcinogens, could be found. Research on the general problem, the conditions under which chlorinated organics are formed, their toxic effects on man and aquatic life and the means to prevent their formation or remove them is underway."

It is conforting that that study is "underway" but no firm conclusions will be public according to Ehreth until 1985, a time when presumably with the passage of this legislation many will be under construction. Can we afford to Congressionally sponsor these pipelines without all the facts on potential hazards to human health? Should we place the citizens of our country, who live in and around the areas where these pipelines terminate, in jeopardy by exposure to possible carcinogenic contaminants? We believe that those studies should be completed before proceeding with coal slurry pipelines.

Exotic Slurry Mixtures

H.R. 1010 provides no assurance against transportation of unconventional mixtures whose safety and environmental effects have not been assessed.

Virtually all discussion of pipelines has assumed that the mixtures transported will consist of crushed coal and water in roughly

equal amounts by weight, and the limited environmental analyses performed by the Environmental Protection Agency have assumed that this will be the case. However, there are serveral indications that more exotic mixtures may well be transported by pipelines covered by the bill. This possibility calls into question any assurances made concerning the adequacy of treatment technology at the pipelines' destination points and the consequences of spills resulting from ruptures, leaks and use of dumping ponds.

Section 3(2) of the bill as reported defines a coal pipeline as any pipeline system for the transportation of coal "whether in a liquid or solid state and whether alone or mixed with other substances . . ."

A Washington consulting firm announced in April that there is emerging a market among utilities and large industrial consumers of energy for coal-oil, coal-methanol-water, and petroleum coke-oil mixtures in addition to coal-water mixtures as boiler fuel.

The firm indicated that New York would be a leading market for such fuel mixtures, followed by other highly populated States including Massachusetts and Florida and the Washington, D.C. metropolitan area. This coincides in part with testimony received by the Committee that use of coal-water mixtures fed directly into boilers without dewatering is likely to gain wide acceptance, and that Pennsylvania coal is particularly well suited to the process. It further coincides in part with the fact that use of a coal-water-oil mixture is being initiated by a Florida utility.

The specific relevance of these facts to coal slurry pipelines is suggested by the possible intentions of Energy Transportation Systems, Inc., whose coal slurry pipeline project is nearest to becoming a reality. ETSI has secured an agreement with the State of South Dakota for rights to 50,000 acre-feet of water annually from the Oahe Reservoir. According to that agreement, 20,000 acre-feet will be diverted for the coal slurry pipeline. The remainder of the water, 30,000 acre-feet, is intended for either a second coal slurry pipeline or "other energy industry use." The term "energy industry use" is defined in the agreement as including use of water "as a medium for carrying coal or other energy minerals, or in the extraction or refining of energy minerals." Such minerals are defined as including "any mineral fuel including, but not limited to, coal, lignite, petroleum, oil, natural gas, uranium and thorium and any combination of minerals used in the production of energy."

The fact that rights to water for these permissible uses have been secured by ETSI by means of this agreement demonstrates that there is more than meets the eye in "coal pipeline" legislation. This combination of rights would make it entirely feasible for some of the water granted to be used for coal liquefication, with the resulting product shipped through the pipeline alone or in combination with some other mineral. And the fact that a number of diversified energy companies are poised to enter the coal slurry business demonstrates that the potential use of this legislation is far broader than the record to date would indicate.

Spill Hazards Unresolved

The bill has no protections for the environment from potential hazards caused by slurry spills.

According to the Office of Technology Assessment, there are two major occurrences which could result in a spill—a pipeline rupture due to excessive pressure and the other when the pipeline accidentally is struck by digging equipment. Because of the relatively high pressures of coal slurry flow, it is believed by pipeline designers that small leaks will normally develop quickly into major ruptures.

There has been a major spill on the one currently operating coal slurry pipeline. On February 18, 1977, the Black Mesa Pipeline broke in two places near Kingman, Arizona. Due to human error, a valve was closed at the Mohave Generating Station and the pipe burst. Two hundred tons of black coal slurry spilled out and covered an area of the desert the size of four football fields.

There were not then, as there will not be after approval of this legislation, any recommended procedures for dealing with such spills. The Black Mesa spill was not cleaned up. The sludge was left where it poured out of the pipe to seep into the soil and water tables or to be blown away by the wind.

It has come to our attention that one additive used as a corrosion inhibitor, hexavalent chromium, could have been in that spill. Hexavalent chromium is listed by the Environmental Protection Agency as a toxic substance and a known carcinogen. This sludge was not treated before it spilled out on the land—it was dumped as it came out of the pipeline after an accident.

Proponents offer assurances that the accident at Black Mesa was caused by human error and current technology would prevent such a spill in the future. Other than those so-called assurances there was no concrete evidence presented that current technology will guarantee a spill-free future. The ETSI Pipeline, which presumably will have the latest technology, would, in a similar spill, spread 600 tons of slurry across farmland or a downtown urban area. At the very least, all critical questions should be answered before proceeding with H.R. 1010.

Agricultural Land Depletion

H.R. 1010 would adversely affect farmers and contribute to an alarming trend in farmland depletion.

Through the broad, all-inclusive grant of eminent domain authority to private pipeline developers, this legislation encourages the continuation of an alarming trend in farmland depletion. All major farm groups, including the American Agriculture Movement, Farm Bureau, Farmers Union and the National Grange have unanimously protested the lack of protection this bill affords the farmer or rancher in preserving a valuable natural resource—land.

On an annual basis, approximately three million acres of agricultural land is taken out of production each year, of which one million acres is prime agricultural land. A leading agricultural expert on land and conservation issues, Neil Sampson, in his book, Farmland or Wasteland, states this disturbing statistic in more frightening terms:

> Every hour about 320 acres of U.S. agricultural land are converted to non-farm uses. Not all of that land is cropland, but about 100 acres are, and another 100–120 acres have the physical capability to be used for cropland . . . Losing 220 acres of existing and potential cropland an hour means losing over 5,000 acres every day—the equivalent of 23 average Missouri farms. It means an area the size of the average Missouri county every 2½ months, and the equivalent of the whole State by the year 2000.

Former Agriculture Secretary Bob Bergland has been quoted as saying that we are on a "collision course with disaster" unless we do something to address this issue. Additionally, the Farmland Protection Policy Act enacted in 1981 encouraged the Federal Government to " minimize the extent to which Federal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses . . ."

Proponents may argue that the conversion of small individually insignificant parcels of farmland, which may be necessary for the construction of a coal slurry pipeline, would be that land's highest and best use and would not effect the overall farmland base when looking at our nation's vast wealth of agricultural resources. This approach to the issue is seriously flawed and fails to take into consideration the cumulative effects of promoting new land uses at the expense of prime agricultural acreage. It should be noted that as the bill is presently structured, large amounts of land could be taken—not only for the actual pipeline construction but also for maintenance, operation and extension of a pipeline. Some of the proposed pipelines may require facilities for emptying the pipeline should, for any reason, a pipeline have to shut down. These huge "dumping ponds" may be required at every pumping station along the entire route of a pipeline, perhaps every 50 to 100 miles. It is obvious even to a casual observer that the proponents of this legislation have failed to scrutinize seriously these major environmental concerns.

Despite all of these environmental and land use concerns, H.R. 1010 as reported, contains more extensive Federal eminent domain privileges for pipeline companies than in previous coal slurry legislation. During the 96th Congress, in the reported version of H.R. 4370, the Federal right to condemn an individual's land was significantly limited to rights-of-way over, under, upon, or through non-Federal lands owned by common carriers engaged in the interstate movement of coal. Such language would protect the farmer and rancher's land, and, at the same time, allow for coal slurry pipelines to move forward. As one proponent of the bill stated during testimony: "The construction of coal pipelines across several State lines requires Federal eminent domain . . . *without it, railroads will continue blocking pipeline construction and denying pipelines the most economical and direct route* (Emphasis added)." Notwithstanding the fact that previous supporters of coal slurry pipelines were able to live with a more restricted grant of Federal eminent domain, an amendment to conform H.R. 1010 to this language was labeled by the proponents as unworkable. In less than three years, the proponents of this legislation have become more greedy in ex-

panding eminent domain powers for the pipeline, at the expense of the farmer. In addition to its other serious flaws, this legislation exacerbates our problem of increasingly becoming more dependent on a steadily shrinking land base for agricutlural production, raising serious environmental concerns for the future.

State Standards Excluded

This bill omits protection in existing law whereby State standards governing public health, safety and environmental protection shall apply, if more stringent than Federal standards, to pipelines crossing Federal land.

This is another give-away to the coal pipeline industry at the expense of the public interest, in a manner totally unnecessary to construction of the pipelines.

The legislation reported by the Committee contains a section governing rights-of-way across Federal lands. This is totally unnecessary, since the Federal Land Policy and Management Act of 1976 (FLPMA) already contains such authority. FLPMA, however, provides in section 505(a)(iv) that each grant of right-of-way shall contain terms and conditions which will "require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards . . . "

This bill specifically deletes that requirement.

It is curious that the Committee has chosen to do so. The more stringent State standard provision was absent from the introduced version of H.R. 1010 as originally referred to the Interior Committee. It was specifically added by amendment to overcome that deficiency. There appears to be no plausible reason for this Committee to take it upon itself to substitute its judgment for that of the Interior Committee in this particular instance, since FLPMA is under the jurisdiction of that Committee.

Preemption of State Law

H.R. 1010 fails to protect State laws governing the location, construction, operation or maintenance of coal slurry pipelines in conformity with legitimate State interests.

If there is a single, predominant and explicit purpose to this legislation, it is to provide the Federal power of eminent domain for coal slurry companies to acquire their rights-of-way for their pipelines. Its rationale is opposition by railroads to coal slurry pipelines' crossing their rail rights-of-way and the ability of other landowners to block construction or hold out for excessive costs. It is also claimed that some States have no eminent domain statutes applicable to slurry pipelines, that other States have enacted "onerous" provisions inhospitable to the pipelines, or that the pipelines have difficulty in qualifying for use of such State authority.

However, there is a substantial threat that by-passing of State eminent domain statutes will have the effect of by-passing those provisions of law built into the eminent domain statutes which—or are applicable to pipelines exercising their authority—establish conditions reflecting valid State interests.

Section 350.80 of Florida Statutes Annotated, for example, states in part:

> (1) Any person, corporation, or other legal entity which exercises or intends to exercise powers of eminent domain pursuant to S. 361.08, or which owns or operates a coal slurry pipeline which was constructed on property acquired by eminent domain, shall be subject to regulation as a common carrier by the Florida Public Service Commission, unless such regulation is preempted by regulation of the Interstate Commerce Commission, and then only to the extent that such regulation is actually preempted by the Interstate Commerce Commission, to assure fairness in rates, rate structure or tariffs, and conditions of service.
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> * * * * *
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> (4) It is the intent of the Legislature that electric utility companies under the regulation of the Florida Public Service Commission shall not unduly profit from markups on the purchase of the coal for the pipeline in the event that such companies are participants in the coal pipeline company. To this end, the Commission shall have the right of access to the appropriate financial records of any coal pipeline company in which electric utility companies participate with regard to any rate hearing for the affected electric utility company.

Oklahoma's eminent domain statute section 7.1, title 27, Oklahoma Statutes Annotated, states in part:

> Any pipeline company proposing to transport coal by pipeline in or through this State must first be licensed to operate by the Oklahoma Corporation Commission and no such license shall be granted until the Commission has, after a public hearing determined a public need and necessity and a showing of economic feasibility for the proposed pipeline. All licenses granted under this act by the Oklahoma Corporation Commission shall include a requirement that the utility purchaser of coal shall not pass through to the consumer, nor include in its capital base, any rate or charge for transportation of coal higher than the lowest cost available by common carrier. The Corporation Commission shall not issue or consider a license until such applicant shall have produced legal proof that adequate supplies of water have been acquired to conduct transportation of coal by pipeline during the life of the contract. Provided further, that the Commission shall not issue a permit, certificate, or any authority to any applicant whose rates and charges are not regulated by government authority, either State or federal, and such State or federal regualtions insure to the public and to the ultimate electric consumer that the contracts, rates and charges shall be just and reasonable, nondiscriminatory and offering no preference or advantage to any perosn, corporation, entity or group.

That the concerns reflected in these statutes are legitimate is evident from the discussion of the need for economic regulation in the discussion of common carrier obligations, appearing elsewhere in these views.

The bill contains a provision, entitled "Non-Preemption of State Ratemaking Authority" (section 13), which provides only that:

> Nothing in this Act, or any amendment made by this Act, shall be construed to preempt or otherwise affect the ratemaking authority of any State utility regulatory agency or the Federal Energy Regulatory Commission with respect to electrical rates or to require any form of automatic pass-through of costs related to the construction, operation, and maintenance of any coal pipeline or electrical rates charged by a utility.

This is clearly insufficient.

Material submitted for the record of hearings before the Senate Committee on Energy and Natural Resources suggests that State statutes regulating land management, intrastate water use and control, pollution control and resource management could be affected by this act.

We think the Senate Committee, in its reported version of S. 276, was wise to include section 6(b) which reads: "Nothing in this Act shall impair the validity of or in any way preempt any . . . State or local law, regulation, or rule of law pertaining to the location, construction, operation, or maintenance of an interstate coal pipeline distribution system except where such State or local law, regulation, or rule of law discriminates against interstate coal pipeline distribution systems."

Evidently finding merit in the hearing material cited above, the Senate Committee strengthened a savings clause in the introduced bill whose effect would have been to preserve any State laws from any implication of preemption provided they did not have the effect of prohibiting a pipeline. Its rationale for the stronger language follows:

> Again concerned about the standards to be applied under this section, the Committee chose to delete the exception related to prohibition of pipeline activities and substituted in its stead the concept that, any State or local law pertaining to location, construction, operation or maintenance would be applicable to an interstate coal pipeline distribution system except where such State or local law discriminated against coal pipeline activities. The Committee intends to make clear under this section that such State laws will apply even where they would serve to prohibit the location, construction, operation and maintenance provided that the application is non-discriminatory. Thus, the authority of a state to apply its laws related to construction, location, operation and maintenance is broadened to allow non-discriminatory prohibitions.

The failure of this bill to address these concerns in any manner should give pause to Members concerned about protecting States' rights and prerogatives in matters quite apart from water law.

Override of State Eminent Domain Authority

H.R. 1010 does violence to traditional State eminent domain authority.

Although not expressly stated in the Constitution, it is well established that the power to govern implicitly authorizes the appropriation of private property for a public good if just compensation is afforded. This preeminent power of eminent domain resides with both national and local governments under our system of federalism. Specifically, in relation to the former, the Fifth Amendment implies this extraordinarily broad power if a compelling national interest will be served.

We feel that neither the requisite national interest standard is met nor, more precisely, is a need for Federal intervention into an area more legitimately entrusted to each State's law demonstrated in this legislation. For the first time, H.R. 1010 provides this weighty Federal grant of condemnation authority to private companies interested in developing coal slurry pipelines with very little substantiation of relevant precedent. Proponents often cite the fact that other pipelines or the rails themselves have had this right and that all coal slurry pipelines want is equal treatment. In reality, coal slurry pipelines' acquisition of this expansive Federal condemnation right would not follow precedent but, to the contrary, establish a new and dangerous one.

It is true that oil pipelines had the right of Federal eminent domain for a brief period during World War II, a time of grave, national emergency. Today, oil pipelines no longer have this authority. Moreover, there is a readily observable differentiation between a wartime emergency and the case covered in H.R. 1010. Additionally, it is also true that pursuant to an amendment in 1947 to the Natural Gas Act, natural gas pipelines have the right to utilize Federal condemnation. Both natural gas and coal are essential to the nation's energy security. However, unlike the reasons that have been proffered by slurry proponents, natural gas pipelines are the only practicable way to transport that product to most consumers, whereas coal is now being handled adequately by rail, barge and truck. Finally, the statement that the railroads had Federal eminent domain powers is accurate, but only to the extent that such powers were essential in opening up the American West at a time when Federal territories, as opposed to States, were in existence. Even the vice chairman of the Slurry Transport Association's board of directors recognized the unique situation of the railroads in the 19th and early 20th century by stating in testimony before the Senate Surface Transportation Subcommittee, that "I think you could make a strong case that the railroad system was more critical in our nation's development at that point in time than the pipelines are today."

Besides the harmful precedent H.R. 1010 promotes and its concomitant damage to States' rights, there has been absolutely no showing that coal slurry pipelines actually need Federal eminent domain authority. While slurry proponents and developers would like to see pipeline construction excluded from the often more difficult State eminent domain laws which impose requirements such as common carrier obligations, no convincing evidence has been

produced that a pipeline would be precluded absent Federal eminent domain authority. To the contrary, the ETSI pipeline has now obtained nearly 90 percent of its 1400 miles of right-of-way *without any Federal eminent domain* authority. Proponents argue that this is an extremely costly way to acquire right-of-way. Actually, the litigation cost for ETSI right-of-way acquisition was $2.5 million, or six-tenths of 1 percent of $3.8 billion, the total project cost. Certainly that is not an inordinate amount of money to spend on litigation for this aspect of the project.

Moreover, a General Accounting Office report, citing industry sources, maintains that "at least four additional western pipelines may be built by the mid-1980's without Federal legislation." An even more persuasive argument is raised by David A. Skedgell, former president and chief administrative officer of the Slurry Transportation Association, in sworn testimony presented to the Interstate Commerce Commission. In his statement, Mr. Skedgell emphasizes, "In my view, even if Federal eminent domain and an ICC certification process were now available, it is highly doubtful that any western coal pipeline project would be advanced beyond where it stands today." He continues, "Rather than rail carrier intransigence, as suggested by Professor Kahn, western coal pipeline projects have faced delay because of poor market conditions, unavailability of secure water supplies, environmental difficulties, and general landowner resistance to pipeline crossings." Finally, he points out " perhaps the most persuasively difficult obstacle to the successful planning and construction of coal slurry pipelines in the west is the relatively large volumes of water necessary to their operation over a 20–30 year project lifetime."

We feel that the legislation in its current form adversely impacts upon the private the private landowner and the broader issue of States' rights. By failing to show a compelling need for this unusual grant of power to private companies, we are deviating from our traditional constitutional tests for granting Federal eminent domain powers.

What this legislation does under the guise of national need is accommodate and facilitate the development of yet another special interest—all at the cost of American public.

Special Favors for ETSI

H.R. 1010 singles out the ETSI pipeline for special favors.

The ETSI (Energy Transportation Systems, Incorporated) pipeline is jointly owned by the Bechtel Construction Company, Inter North, KN Energy, Inc. and Texas Eastern. This pipeline is a major example of why this legislation is not needed because they have achieved at a relatively low litigation cost 90 percent of their right-of-way. However, this special interest legislation hands the ETSI pipeline a big plum, even if it utilizes Federal condemnation authority to acquire the last 10 percent of needed right-of-way. That plum is an exemption from Federal standards for design, installation, construction, initial inspection and initial testing. In other words, ETSI can build its pipeline but not have to comply with Federal standards that all the other pipelines constructed would have to follow.

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An amendment was offered during Subcommittee markup which would have made Federal standards applicable to ETSI, along with all other coal slurry pipelines yet to be constructed. The proponents argued and voted that this one pipeline is somehow unique, different and privileged above the rest and thus not subject to even minimum Federal standards.

This is not atypical of the attempts of these coal slurry special interests to acquire unique privileges, but it is unusual that the ETSI pipeline has placed itself through this bill as a "first among equals."

WATER LAW LANGUAGE

OVERVIEW OF WATER ISSUES

1. Summary of Problem.—In attempting to (1) override the effect of a recent U.S. Supreme Court ruling, (2) foster the creation of a new interstate coal slurry pipeline industry, and (3) provide assurances that the water law of the State in which a pipeline originates shall govern the availability and use of water for such pipeline, the bill, in a fashion that has no precedent, delegates to the originating State Congress' plenary powers under the Commerce Clause of the Constitution and, thereby,

At worst, places downstream States (in the case of interstate surface waters) and adjacent sharing States (in the case of multistate underground aquifers) at an enormous and potentially fatal disadvantage in terms of attempting to protect their water-related interests against any originating State wielding the Commerce Clause powers being newly delegated in the bill, and

At best, provides incomplete and illusory assurances to the originating State concerning (1) the operativeness of its water law and (2) the extent that the bill's delegation of the power of eminent domain to the pipeline companies will also give the companies the power to condemn or otherwise obtain and use water and continue to operate over the objection of the State.

To the extent that one or the other of these problems is determined not to exist, the other does. The situation is further aggravated by the bill's proposed language, which is both of questionable meaning and doubtful constitutionality, and which attempts to effectuate an extremely unsound public policy.

2. Background.—The idea of transporting coal in slurry form via pipeline has been under debate for more than 20 years. During this time, perhaps no issue has created more concern than the question of how coal slurry pipelines can be constructed without affecting the authority of the States to regulate water.

In coal slurry bills that have been considered by recent Congresses, various versions of water law language have been developed and characterized by coal slurry proponents as being sufficient to provide adequate protection to States and others concerned about the water law issue.

During the 97th Congress, the Committee on Interior and Insular Affairs drafted provisions in H.R. 4230 which it believed would not invalidate or supercede the traditional authority and responsibility

of a State over its water resources. Subsequently, on March 30, 1982, the Subcommittee on Surface Transportation of the Committee on Public Works and Transportation approved identical water law language in its markup of the jointly-referred H.R. 4230. Approximately three months later, on June 27, the full Public Works Committee ordered the bill reported favorably, with no change in the water law language. The 97th Congress adjourned before H.R. 4230 could be considered and debated on the Floor of the House.

Little more than three weeks before the full Public Works Committee acted on H.R. 4230, the United States Supreme Court announced its blockbuster decision in *Sporhase* v. *Nebraska,* 458 U.S. 273 (July 2, 1982). This decision and a subsequent Federal District Court decision applying *Sporhase*—neither of which involved disputes over water for coal slurry pipelines—have cast into serious doubt the validity of a number of State statutes which prohibit or may be used to prohibit the export of water from the State.

The *Sporhase* case arose when the Nebraska attorney general sued in State court to enjoin farmers owning contiguous tracts of farmland in Nebraska and Colorado from transporting groundwater across the border without a permit. Nebraska's statute acted to ban the export of water for use in Colorado because Colorado prohibited the export of water outside its borders. The Supreme Court struck down Nebraska's statutory provision as an unconstitutional burden on interestate commerce, finding that: (1) groundwater is an article of commerce and therefore subject to Congressional regulation, (2) the Nebraska restriction on the interstate transportation of groundwater imposed an impermissible burden on interstate commerce, and (3) Congress had not granted the State permission to engage in groundwater regulation that otherwise would be impermissible.

The first Federal District court case to apply *Sporhase* did so in a way that many felt was even more threatening than *Sporhase.* In *City of El paso* v. *Reynolds,* the City of El Paso in western Texas sought a judicial declaration of the invalidity of the New Mexico constitution and the State's statutory embargo laws, both of which prohibited the exportation from New Mexico of groundwater. On January 17, 1983, the District Court ruled that both New Mexico laws violated the Commerce Clause of the Federal Constitution, holding that only the strongest conservation rationale—needed for the protection of human health and safety—could justify a State statutory ban on water exports. The Court in *El Paso* ever went so far as to reject agricultural use as a sufficient conservation rationale, construing it as merely another competing economic demand.

In the first few months of the 98th Congress, the Interior Committee reacted to this situation by developing legislative language substantially different from that which it included in that Committee's version of H.R. 4230 during the 97th Congress.

The current version of the Interior-reported water language was adopted, with only slight modification, by our Committee on Public Works and Transportation (See Table 1).

TABLE 1.—COMPARISON OF WATER LAW LANGUAGE IN COAL SLURRY LEGISLATION REPORTED BY THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION IN 97TH AND 98TH CONGRESSES

97th Congress: H.R. 4230	98th Congress: H.R. 1010
SHORT TITLE	SHORT TITLE
SECTION 1. This Act may be cited as the "Coal Pipeline Act of 1982".	SECTION 1. This Act may be cited as the "Coal Pipeline Act of 1983".
FINDINGS	FINDINGS AND PURPOSE
SEC. 2. The Congress finds and declared that—	SEC. 2. (a) The Congress hereby finds and declares that—
No comparable provision.	(1) the continuing dependence of the United States on foreign sources for petroleum and petroleum products entails grave national security risks, results in major balance-of-payment deficits, and causes increases in inflation and unemployment in the domestic economy;
No comparable provision.	(2) the United States possesses extensive coal reserves that must be produced, transported, and utilized to reduce the Nation's dependence on imported petroleum;
No comparable provision.	(3) domestic coal reserves cannot be developed and used for fuel unless adequate transportation systems and facilities exist for the efficient and economic transportation of coal to markets in interstate and foreign commerce at competitive prices across great distances;
No comparable provision.	(4) the Nation's coal transportation system should include coal pipelines that will assist the Nation to develop efficiently and use its coal resources;
(1) the construction of pipelines to transport American coal will be facilitated by granting the power of eminent domain to certain coal pipeline carriers and	(5) the construction of coal pipelines to transport domestic coal will be facilitated by granting the power of eminent domain to certain coal pipelines;
(2) the construction of pipelines to transport American coal is a beneficial public use that justifies granting the Federal power of eminent domain to coal pipelines for which certificates of public convenience and necessity are issued under this Act.	(6) the construction of coal pipelines is a beneficial public use that justifies granting the Federal power of eminent domain to those pipelines for which a finding of public convenience and necessity has been made pursuant to this Act;
No comparable provision.	(7) State water law and interstate allocations are carefully balanced and structured systems for the allocation of water;
No comparable provision.	(8) the need for coal pipelines is subservient to the national interest in the primacy of State water law and interstate allocations; and

No comparable provision.

No comparable provision.

No comparable provision.

No comparable provision.

STATE WATER LAW

SEC. 10. (a) The United States or its agents, permittees, licensees, or transferees shall not reserve, appropriate, use, divert, dedicate, or claim water within any State for a coal pipeline or extension thereof with respect to which a certificate is issued under section 10952 of title 49, United States Code, unless such reservation, appropriation, use, diversion, dedication, or claim takes place pursuant to State substantive and procedural law.

(9) therefore, the national interest is best served by developing coal pipelines only if such development is now or hereafter permitted by those State water laws and interstate allocations, notwithstanding the otherwise impermissible burden which may thereby be imposed on interstate commerce.

(b) The purpose of this Act is to facilitate the development of coal pipelines by granting the Federal power of eminent domain to those coal pipelines that are determined to be required by the public convenience and necessity, except that Congress declares that the development of coal pipelines may occur only if now or hereafter permitted by State water law and interstate allocations and hereby delegates to and ratifies the exercise of such authority by the States as further set forth herein.

DEFINITIONS

SEC. 3. As used in this Act (other than section 5)—

(5) The term "interstate allocation" means the allocation of water between States by interstate compact or legislative or judicial allocation.

(8) The term "State Law" includes all that body of constitutional or statutory law, judicial precedent, administrative regulation and administrative decision, whether now in existence or hereafter enacted, decided, or promulgated by a State or its properly constituted officials.

STATE WATER LAW

SEC. 10. Notwithstanding any other provision of this Act or any other Federal law:

(a) Neither the United States nor any other person or entity shall reserve, appropriate, use, divert, dedicate, export, or otherwise claim or exercise any right or interest in, water within any State for a coal pipeline unless such reservation, appropriation, use, diversion, dedication, export, or claim takes place pursuant to the substantive and procedural law of that State.

TABLE 1.—COMPARISON OF WATER LAW LANGUAGE IN COAL SLURRY LEGISLATION REPORTED BY THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION IN 97TH AND 98TH CONGRESSES—Continued

97th Congress: H.R. 4230	98th Congress: H.R. 1010
(b) Pursuant to the commerce clause in article I, section 8, of the United States Constitution, the Congress declares that the establishment and exercise of terms or conditions, including terms or conditions terminating use, on permits or authorization for the reservation, appropriation, use, or diversion of water for a coal pipeline or extension thereof with respect to which a certificate is issued under section 10952 of title 49, United States Code, shall be determined pursuant to State law notwithstanding any transportation, use, or disposal of such water in interstate commerce.	(b) Pursuant to the commerce clause in article I, section 8, of the United States Constitution, the Congress hereby expressly delegates to the States the power to establish and exercise in State law, whether now in existence or hereafter enacted, terms or conditions (including terms or conditions denying or terminating use) for the reservation, appropriation, use, export, or diversion of or other claim to, or exercise of any right in, water for a coal pipeline, notwithstanding any otherwise impermissible burden which may thereby be imposed on interstate commerce.
(c) Nothing in this Act shall alter in any way any provision of State law, regulation, or rule of law or of any interstate compact governing the appropriation, use, or diversion of water.	(c) Nothing in this Act, or any amendment made by this Act, shall alter in any way or affect the validity of any provision of State law, regulation, or rule of law or of any interstate compact governing the appropriation, use, export, or diversion of, or other claim of right to, water, except as provided in subsections (a) and (b) of this section. Nothing in this Act, or any amendment made by this Act, shall alter the rights of any State to its apportioned share of the waters of any body of surface or ground water, whether determined by past or future interstate compacts, or by past or future legislative or judicial allocations. No State acting under the authority of this section may restrict the importation or movement through the State of water acquired in another State and within a coal pipeline. Nothing in this Act, or any amendment made by this Act, shall affect water rights of any Indian or Indian tribe. In the event of any conflict between the provisions of this Act or other Federal law, the provisions of this section shall govern.
No comparable provision.	(d) Nothing in this Act, or any amendment made by this Act, shall preempt or otherwise affect any State or Federal law or interstate compact relating to water quality or disposal.

3. The Bill's Language.—The Public Works Committee, in adopting substantially without change—and over our objections—the water law language of the Interior Committee, ratified the two major policy decisions made by the Interior Committee relating to State water law. In our view, these were:

(1) That a State in which a coal slurry pipeline originates or is proposed to originate should be given complete, legally unquestionable control over any form of acquisition or use of water for the pipeline; and

(2) That the use of eminent domain authority granted by this legislation should be subordinated to such State's authority over water acquired for or used in coal pipelines.

The bill's language, according to the Interior Committee report, is intended to grant to the States—in the area of coal pipelines—authority that the States under *Sporhase* may not have, i.e., the language is intended to create a legislative exemption from the *Sporhase* decision for State control of coal pipeline water. The language intentionally attemps to grant to the originating State, with only very limited exceptions, "control over all wate (sic) that might be made available for use by coal pipelines, whatever the legal source of the claimed right to the water".

H.R. 1010 attempts to accomplish these stated objectives by purporting to delegate to any State in which a coal slurry pipeline originates or is proposed to originate all of Congress' power under the Commerce Clause of the U.S. Constitution

> . . . to establish or *exercise in State law,* whether now in existence or *hereafter enacted,* . . . for the reservation, appropriation, use, export, or diversion of or other claim to, or exercise of any right in, water for a coal pipeline, *notwithstanding any otherwise impermissible burden which may thereby be imposed on interstate commerce.* (Sec. 10(b); emphasis added.)

"State law" is defined in Section 3 of the bill to encompass even administrative regulation and administrative decision promulgated in the future by State officials.

The first sentence of subsection 10(c) allows "any provision of State law, regulation, or rule of law or of any interstate compact" governing water and water rights to be altered or affected by an originating State using these specially-delegated Congressional Commerce Clause powers (Subsection 10(b)) and its own substantive and procedural State law (subsection 10(a)).

The last sentnece of subsection 10(c) declares that "In the event of any conflict between the provisions of this Act or other Federal law, the provisions of this section shall govern." Subsection 10(d) protects State or Federal laws or interstate compacts—to the extent that it protects them at all—from being preempted or otherwise affected only with respect to water quality or disposal.

The rights in interstate waters of States not the originating State are allegedly protected by the language of subsection 10(c), an allegation that we strongly reject as explained in detailed below.

The legally operative effect of all of the bill's water language, especially that purporting not to affect other laws, is cast further into doubt by the lead-in phrase to all of Section 10's subsection

provisions: "Notwithstanding any other provision of this Act or any other Federal law:". This, of course, is a phrase normally selected by legislative drafters to change, not protect, other contrary or inconsistent laws.

4. Congressional Commerce Clause Power.—The power which subsection 10(b) of H.R. 1010 purports to expressly delegate is the power of Congress pursuant to the Commerce Clause in Article I, Section 8, of the United States Constitution. Article I, Section 8, paragraph 3 of the Constitution empowers Congress to "regulate commerce with foreign nations and among the several States, and with Indian tribes."

This is tremendously broad and far-reaching power. More than 150 years ago, Chief Justice John Marshall described Congress' Commerce Clause power in *Gibbons* v. *Ogden,* 22 US. (9 Wheat.) 1 (1824) as follows:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power . . . may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.

Almost eighty years later another of our Nation's greatest jurists, Justice John Harlan, similarly wrote:

> It must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution.

The exercise of the Commerce Clause power has been found to be so expansive as to allow Federal regulation of an individual farmer's wheat production not intended in any part for commerce but wholly for consumption on his farm. In fact, with only one exception that we are aware of, no Federal statute has been held in the past fifty years to exceed Congress' Commerce Clause power (see *National League of Cities* v. *Usery* (1976).

This is the nature of the power that H.R. 1010 is purporting to delegate to a State in which a coal slurry pipeline originates or is proposed to originate. The bill would attempt to have Congress make this delegation—an action that as far as we know is without precedent in the history of our country—for the purpose of benefiting, not an established and fundamentally important industry like agriculture or national defense, but an entirely new and speculative proposed industry: coal slurry. And it would take this step with respect to a resource that is essential to life itself, is known to exist in inadequate amounts, and will be diverted from the region of the country that most needs to conserve its scarce water resources.

SHARED WATER: THREAT, NOT PROTECTION

1. *The rights in shared interstate waters of downstream and adjacent States are not only unprotected by H.R. 1010's language but are seriously eroded and jeopardized by it.*

Despite the protestations of the proponents of this legislation that the rights of all affected States are protected, we are gravely concerned that if the bill's water language is somehow found to be

constitutional, the liklihood of which is very much in doubt as we discuss more fully below, these provisions would protect only the interests of the State which desires to divert and sell valuable water for use in new coal slurry pipelines. The language of H.R. 1010 significantly erodes existing State water law protections for all other States and, in fact, seriously jeopardizes the ability of those States to protect their legitimate State interests against rights being claimed by a State of Origin using its newly-delegated Congressional Commerce Clause power.

The rights of downstream and adjacent sharing States in interstate waters are supposedly protected by language in subsection 10(c). However, the language of the Interior Committee report recognizes that "the substantial concerns expressed by Members of Congress and others about the possible effects the broad authority delegated to States to control waters for coal pipelines may have on the water resources of other States not the origin of such water . . . are understandable . . .". While we applaud the Interior Committee's recognition, we strongly believe that:

(a) The rights of downstream States (in the case of interstate surface waters) and adjacent sharing States (in the case of multi-State underground aquifers) are not only *inadequately protected* by the bill's water law language, but *are seriously jeopardized* by it; and

(b) Responses to this situation such as the Interior Committee's report language that those "concerns . . . are understandable and . . . should receive attention from the Congress in the future" are unacceptable head-in-the-sand approaches to avoid the need to truly recognize and resolve these concerns.

The following sentence-by-sentence analysis of the allegedly "protective" language in the bill's subsection 10(c) clearly demonstrates the nature of the problem that downstream and adjacent sharing States are subjected to under H.R. 1010.

TABLE 2.—ANALYSIS OF LANGUAGE IN SUBSECTION 10(C) OF H.R. 1010

Subsection 10(C)	Analysis
1. Nothing in this Act, or any amendment made by this Act, shall alter in any way or affect the validity of any provision of State law, regulation, or rule of law or of any interstate compact governing the appropriation, use, export, or diversion of, or other claim of right to, water, except as provided in subsection (a) and (b) of this section.	This language looks like protective language. But it's exactly the opposite. With the Except Clause as the first part of the sentence, it becomes plain that the sentence actually *allows State water laws to be changed* in accordance with subsections (a) and (b). And how can they be changed? Subsections (a) and (b) provide that water rights associated with coal slurry pipelines are to be decided under the substantive and procedural law of the State within which the water is withdrawn, i.e., the *State of Origin*, (subsection 10(a)) and *under the cloak of Congress' Commerce Clause power* (subsection 10(b)). In other words, the State of Origin under the language of this sentence can use its own State law, *fortified by Congress' Commerce Clause powers* to "alter in any way or affect the validity of any provision of State law, regulation, or rule of law or of any interstate compact governing the appropriation, use, export, or diversion of, or other claim of right to water". *This language provides no protection to downstream or adjacent States. Quite the contrary!* It contributes to the need to protect the interests of such States, a matter which becomes even more compelling in light of Section 3's definition of "State law" to include future administrative decisions promulgated by the State's officials.
2. Nothing in this Act, or any amendment made by this Act, shall alter the rights of any State to its apportioned share of the waters of any body of surface or gound water, whether determined by past or future interstate compacts, or by past or future legislative or judicial allocation.	*This sentence, like the first, appears to provide protection while, in reality, providing none.* In the first place, it is more hortatory than substantive. It merely says that *States are entitled to* what they're entitled to and this Act doesn't change that. Not much consolation here since, to produce a different result, an amendment to the Constitution would be necessary. Secondly, the provision merely speaks in terms of "nothing in this Act, or any amendment made by this Act, shall alter". It provides little, if any, protection to adjacent or downstream States with respect to the kind of law a State of origin could pass using its new Commerce Clause powers the day after the language becomes law.

3. No State acting under the authority of this section may restrict the importation or movement through the State of water acquired in another State and within a coal pipeline.

4. Nothing in this Act, or any amendment made by this Act, shall affect water rights of any Indian or Indian tribe.

Thirdly, focus on the sentence's mention of *future legislative or judicial allocation* and ask the following question: which State would I rather be in a lawsuit contesting water rights if the bill's unamended water law is enacted, the State of Origin or another State potentially affected by the first State's actions? The answer is clear. The State of Origin is protected under the Commerce Clause; the other State is not.

And, lastly, the sentence speaks only in terms of altering rights to *apportioned shares* of water. What about the provisions of existing interstate compacts which address other matters, such as use limitations, interbasin tranfer prohibitions, consent requirements, relative priority of water rights, and the like? For example, Article X of the existing Yellowstone River Compact, (Montana, Wyoming, and North Dakota) states: *"No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory states."* The water law language in the bill before us provides no protection with respect to this provision of the Yellowstone Compact. In fact, it allows that language to be overridden and effectively repealed.

This sentence, as with the first sentence of the subsection, is *part of the problem, not part of the solution.* What this sentence says is that, once the State of Origin uses the extraordinary Congressional Commerce Clause powers to acquire coal pipeline waters, other States cannot attempt to protect their interests with respect to that water using the same Congressionally-delegated Commerce Clause power. *Only the State of Origin gets to use Congress' special powers.* Downstream or adjacent States are left to fend for themselves. No protection for those States here—only more need for protection.

Even one of the pro-slurry witnesses who testified at our Subcommittee hearings this year admitted that "the disclaimer of application to Indian rights would allow . . . the possibility of pipelines obtaining water supplies outside the ambit of State law." This provision hardly provides any protection to downstream or adjacent States. Instead, it raises the spector of *additional problems* for them.

TABLE 2.—ANALYSIS OF LANGUAGE IN SUBSECTION 10(C) OF H.R. 1010—Continued

Subsection 10(C)	Analysis
5. In the event of any conflict between the provisions of this section and any other provision of this Act or other Federal law, the provisions of this section shall govern.	This sentence, too, is part of the problem, not part of the solution for downstream and adjacent States. The first sentence of subsection 10(c) allows the State of Origin to use Congress' Commerce Clause powers to alter or affect the validity of State laws and interstate compacts. *This fifth sentence on its face makes the bill's coal slurry language supreme when conflicts arise with other Federal law.* All interstate compacts, of course, under the Constitution of the United States, are creatures of Federal law. Under this fifth sentence, then, *interstate compacts and other Federal law can be changed and are likely to be changed* under authority of this legislation, instead of the other way around. Like so much else in this bill, this language creates serious problems for adjacent and downstream States. It *does not protect them.*

This serious dilemma facing downstream and adjacent States is further aggravated by the bill's language:

(1) qualifying all of Section 10 with the lead-in phrase "Notwithstanding any other provision of this Act or any other Federal law:";

(2) in new subsection 10(d), added by the Public Works Committee, which states that "Nothing in this Act, or any amendment made by this Act, shall preempt or otherwise affect any State or Federal law or interstate compact relating to water quality or disposal; and

(3) in H.R. 1010's definition of "State law", which "includes . . . administrative regulation and administrative decision, whether now in existence or hereafter . . . decided, or promulgated by a State or its properly constituted officials.".

Section 10's lead-in phrase is hardly one which legally serves to protect the provisions of existing law. Instead, it is a phrase repeatedly selected by legislative drafters to produce exactly the opposite result—to override provisions of other laws that do not track the language covered by the lead-in phrase. The new subsection 10(d) makes things even worse. By explicitly attempting to protect State laws only "relating to water quality or disposal", the language is likely to be construed under the principle *inclusio unius est exclusio alterius* as implicitly authorizing State laws to be preempted or affected in other areas, such as those relating to the existence of water rights, use limitations, interbasin transfer restrictions, prioritization of water rights and the like. And finally, the bill's definition of "State law", which under the provisions of subsection 10(b) is bolstered by Congress' Commerce Clause power, allows unnamed State "officials" to act to the detriment of downstream or adjacent States. Thus, the bill's language could be read to allow in certain circumstances a single State official to exercise all of Congress' Commerce Clause power to adversely affect another State—since Congress under Article I, Section 8 clearly has the power to do so—and, conceivably, to override and preempt such other State's laws!

2. *H.R. 1010's language could be read at best to allow a State in which a coal slurry pipeline originates to unilaterally alter or repeal—merely by changing its State law—the provisions of numerous Interstate Compacts, and at worst to amend outright the provisions of these compacts.*

During this century, many States have entered into compacts to allocate and otherwise regulate the use of interstate waters. These interstate compacts have as their overriding purpose the elimination of present and future controversies between the States. Article I, Section 10, Clause 3 of the United States Constitution requires Congressional consent for States to enter into interstate compacts, and this consent and approval carries with it all the legal consequences of any other act of Congress.

While apportioning interstate waters, many interstate compacts also do much more. For example, interstate compacts in many instances impose limitations on the place where allocated water may be used.

(a) Some compacts provide for "beneficial consumptive use in" each State. Examples include: .

(i) The Pecos River Compact (New Mexico, Texas, and the United States: 63 Stat. 115);

(ii) The Republican River Compact (Colorado, Kansas, Nebraska, and the United States: Art. IV, 57 Stat. 86); and

(iii) The Arkansas River Compact (Arkansas, Oklahoma, and the United States: Art. IV, 87 Stat. 569).

(b) Other compacts limit use of appropriated water to the river basin. Examples include:

(i) The Colorado River Compact (Arizona, California, Colorado, Nevada, New Mexico, Utah, Wyoming, and the United States: 45 Stat. 1057, 1064);

(ii) The Yellowstone River Compact (Montana, North Dakota, Wyoming, and the United States: Art. X, 63 Stat. 663);

(iii) The Klamath River Compact (California, Oregon, and the United States: 71 Stat. 497); and

(iv) The Snake River Compact (Idaho, Wyoming, and the United States: 64 Stat. 29).

Existing interstate compacts also employ various schemes for granting consent to circumvent these use limitations. Article X of the Yellowstone River Compact provides that "No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States." Similarly, Article IV of the Snake River Compact prohibits Wyoming from exporting water out of the Snake River drainage without the consent of Idaho and prohibits Idaho from exporting waters out of the Salt River drainage without the consent of Wyoming.

Congress has also acted to create interstate compacts like the Delaware River Basin Compact (New York, New Jersey, Pennsylvania, Delaware, and the United States: 75 Stat. 688), which vests all planning and water allocation in an interstate commission.

The terms and legal affect of numerous provisions of these and many other interstate compacts have been cast seriously in doubt by the water law language in H.R. 1010, which if signed into law, would constitute enactment of Federal legislation subsequent to that which established these compacts and therefore could be held to supersede these current compact provisions.

Reading the first sentence of subsection 10(c) with the Except Clause as the first part of the sentence instead of the last, it becomes much more apparent that the language does alter or affect the validity of interstate compacts governing water for coal slurry pipelines instead of the opposite. By prohibiting alteration "except as provided in subsections (a) and (b) of this section", the language implicitly authorizes such alteration as provided in subsections 10(a) and 10(b). As it relates to interstate compacts, the language may for all intents and purposes amend numerous provisions of interstate compacts such as those discussed above.

Subsection 10(a) specifies that the law of the State in which the pipeline water originates will control both the substance and procedure for the acquisition and use of water within the State for coal pipelines, without regard to the source of the claimed right to water. Subsection 10(b) cloaks the originating State's actions with Congress' plenary Commerce Clause power. The second sentence of subsection 10(c) does not change this amending result since it

speaks only in terms of "the rights of any State to its apportioned share of the waters" and does not even purport to address, much less protect, other matters related to use limitations, interbasin transfer restrictions, compact modification procedures, and the like. Subsection 10(d) must also intend the amendment result since it attempts to protect against preempting interstate compacts only relating to water quality or disposal. The lead-in language to Section 10—"nonwithstanding any other provision of this Act or any other Federal law"—also supports such a conclusion, as does the last sentence of subsection 10(c), which states that "In the event of any conflict between the provisions of this Act or other Federal law, the provisions of this section shall govern."

Thus, upon enactment of H.R. 1010's water language, Article X of the Yellowstone River Compact quoted above should probably be considered to have been amended by the Coal Pipeline Act of 1983 to read as follows:

> No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States unless, with respect to water for a coal pipeline, the State law of the State within which the water originates provides otherwise.

Similar changes could be considered to have been made to any number of other provisions of numerous other interstate compacts, including those listed above.

In any event, even disregarding the question of whether the interstate compact itself is amended, it's effect is clearly altered as soon as an originating State law is changed to allow a portion of the State's allocation under the Compact to be used for a coal slurry pipeline and transported out of the basin to a State like Texas, or Louisiana, from a State like South Dakota, Wyoming or Idaho.

3. *The bill's unprecedented delegation to the State of Origin of Congress' Commerce Clause power may lead to the overruling of numerous Supreme Court decisions allocating interstate waters, as well as to consequences of unknown impact on the Supreme Court's "equitable apportionment doctrine".*

Congress can act to modity or even overrule decisions of the United States Supreme Court. This fact, as was discussed earlier in connection with the *Sporhase* ruling, is one that partially explains the motivation underlying H.R. 1010's current water language.

Water law commentary traditionally refers to three techniques for allocation of interstate streams and aquifers. The most common is through the negotiated agreement of the States in an interstate compact. If no conpact exists, the Supreme Court may allocate, and has done so in many instances, flow under its "equitable apportionment doctrine". Finally, Congress itself may exercise the power to allocate proportionate shares to States, a power it has used in allocating part of the Colorado River flow, for example.

The Supreme Court's "equitable apportionment doctrine" has been used to allocate interstate waters on numberous occasions since its enunciation in 1906. In *Kansas* v. *Colorado,* 206 U.S. 46 (1906), the Court held that its original jurisdiction extended to actions between States to determine their relative rights to the use of

interstate waters. Based on the "cardinal rule" of equality of right between States, the court held that both Colorado and Kansas were entitled to an equitable apportionment of the benefits of the waters of the Arkansas River. In *Connecticut* v. *Massachusetts*, 282 U.S. 660 (1931), the Court explained what equitable apportionment means:

> As was shown in *Kansas* v. *Colorado*, 206 U.S. 46, 100, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the states through which it flows. It means that the principles of right and equity shall be applied having regard to the 'equal level or plane on which all the States stand, in point of power and right, under our constitutional system' and that, upon a consideration of the pertinent laws of the contending States and all other relevent facts, this Court will determine what is an equitable apportionment of the use of such waters.

In *Nebraska* v. *Wyoming* 325 U.S. 589 (1945), the Court elaborated upon the "other relevant facts" that would be considered in effectuating an equitable apportionment:

> physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits of downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interest which must be made.

Effectuation of an equitable apportionment of State waters thus involves a consideration of pertinent State laws of the contending States and an evaluation of relevant physical facts which tilt the equities to one State or the other.

For the first time in the history of our country, H.R. 1010 would upset this carefully developed doctrine—and potentially the allocations that have been made under this authority—by delegating Commerce Clause powers only to the State of Origin, thereby completely upsetting and skewing the equality of right that is the touchstone of the doctrine. There is simply no precedent for a delegation by Congress to a *single* State of exclusive authority to divert water from an interstate source shared by other States. To do so represents a significant change in existing law for, once a single State is given exclusive authority to divert water, the quantity diverted, no mater how large or small, is beyond the application of the doctrine of equitable apportionment.

Regardless of the quantity of water involved, such a delegation is a direct contradiction of the principles underlying equitable apportionment. Today, States sharing an interstate water resource have the right to a judicial allocation of their equitable share. If effec-

tive, this bill would preempt that right, regardless of the ambiguous language in Section 10(c), providing that "nothing in this Act . . . shall alter the rights of any State to its apportioned share . . ." Sections 10 (a) and (b) represent a fundamental, irreconcilable contradition of the doctrine of equitable apportionment that is not and cannot be cured by Section 10(c).

Furthermore, to the extent that the doctrine would be found to exist at all after enactment of H.R. 1010, it would provide little help to aggrieved downstream or adjacent States. Backed by the Federal imprimatur of national interest and beneficial use, and the grant of Federal eminent domain, together with Commerce and Due Process Clause considerations, it is most unlikely from practical standpoint any future equitable apportionment would reduce the availability of water to a coal slurry pipeline.

4. *It is totally unsatisfactory to ask downstream and adjacent States to use "traditional mechanisms" to redress their grievances under H.R. 1010, especially when it is recognized at the outset that downstream and adjacent States have serious and legitimate concerns under the bill's language.*

It is remarkable that coal slurry proponents argue that only "traditional mechanisms" should be made available to adjacent and downstream States for purposes of protecting their interests, while extraordinary mechanisms are being granted to the State of Origin. On the one hand, they want the State of Origin to be able to receive and exercise all of Congress' Commerce Clause powers for coal slurry pipelines under the extraordinary procedure involving Congressional delegation of this power. The "traditional approach" is somehow not sufficient for the State of Origin. On the other hand, when it comes to the ability of adjacent or downstream States to protect their interests against the improper use of this special power, those States are being told that their interests can and should be protected under "traditional mechanisms" or, in the words of the Interior Committee report,

> . . . existing mechanisms which permit the States to seek legislative, judicial and compact allocations.

In other words, try to persuade me—the State that has all this new Congressionally-delegated Commerce Clause power—to voluntarily do what you, the adversely-affected State, want. If I won't agree, sue me or try to get Congress to change the situation with legislation sometime down the road!

This situation is a major and fundamental shortcoming of the bill reported by the Interior Committee and of the virtually identical language in the version reported by the Public Works and Transportation Committee. It is a defect that deserves to be addressed and resolved now, not buried in the sand with the hope that the problem will go away or that it can be passed off to someone else sometime in the future to try and solve.

Furthermore, to make matters worse, H.R. 1010 significantly changes the "tradition" on which any "tradition mechanisms" could be based. As has been discussed earlier, the water law language in H.R. 1010 gives extraordinary powers to the State of Origin; powers which, for all intents and purposes, could effectively lead to the immediate modification of existing interstate compacts

and the ability to modify interstate compacts in the future—both by virtue of the grant to and unilateral exercise by the State of Origin of Congress' Commerce Clause power. The language also raises serious questions concerning its effect on—and even the continued existence of—the equitable apportionment doctrine. Thus, it is no wonder that, as the Interior Committee report recognizes,

> . . . substantial concerns (have been) expressed by Members of Congress and others about the possible effects the broad authority delegated to States to control water for coal pipelines may have on the water resources of other States not the origin of such water.

However, unlike those who voted to report this coal slurry legislation without addressing the concerns of adjacent and downstream States, we reject the approach embodied in the following Interior Committee report language:

> The Committee believes that concerns over allocation of interstate waters, such as certain groundwater aquifers, are understandable and it believes these concerns should receive attention from Congress in the future, as circumstances require.

Water is to important to the health and welfare of our Nation's citizens to be left to the piecemeal, legislate-now, fix-up-later approach being advocated by coal slurry proponents.

Finally, a recent Supreme Court decision—only two and one-half months old—illustrates the peril what awaits those who are willing to wait for problems created by this legislation to be solved sometime in the future by "traditional mechanisms". *Arizona* v. *California,* 103 S. Ct. 1382 (March 30, 1983), involved a dispute over water rights in which a number of Indian tribes sought, because of a calculation mistake that had been originally made, to increase their share of interstate waters which had previously been allocated through litigation. Although the Special Master appointed in the case agreed with the Tribes that their claim was valid and although the United States changed its position from one of opposition to one of support for the issuance of a supplemental decree to grant additional water rights to the reservations, the Supreme Court ruled against the Indians saying, among other things, that

> Recalculating the amount of practically irrigable acreage runs directly counter to the strong interests in finality in this litigation, a major purpose of which has been to provide the necessary assurances to the States and various private interests involved of the amount of water they can anticipate receiving from the Colorado River.

Once a pipeline is in place and operating, what protection will "traditional mechanisms" provide, even for an admittedly aggrieved downstream or adjacent State?

ILLUSORY AND INEFFECTIVE PROTECTION

1. *The language of H.R. 1010 fails to protect and preserve the primacy of State water laws because of the irreconcilable conflict that exists between the bill's two purposes: to foster development of coal*

slurry pipelines on the one hand and protect State water law on the other.

The primary purpose of this legislation, the facilitation of the development, construction and operation of coal slurry pipelines, is irreconcilable with its second avowed purpose, the protection of State water law. In order to facilitate coal slurry, all State laws of eminent domain, beneficial use of water and land, to name but a few categories, will be preempted insofar as they may relate to coal slurry. At the same time, it is suggested, however, that individual States will be given greater powers than they now possess with respect to water used in interstate coal slurry pipelines, even to the point of denying or terminating the use of water in operating pipelines. Because pipelines cannot be operated without a secure source of water, the conflict in this legislation is obvious. All of the witnesses who testified before this Committee, including Carol Dinkins, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, and Messrs. Widman and Bloom, agreed with Professor Corker that the legislation will be challenged in court. In the face of the expression of national interest in the development of coal slurry and the determination of beneficial public use expressed in this legislation, it is clear from both a practical and legal standpoint that this conflict will probably be resolved, if at all, in favor of interstate coal pipelines and at the expense of State water law and local water needs.

Despite the intention, stated in the Interior Committee's report on H.R. 1010, to include language precluding the result reached by the Supreme Court in *First Iowa Hydro-Electric Coop* v. *FPC*, 328 U.S. 152 (1946), the bill's language fails to achieve this objective. The *First Iowa* decision is only a part of a larger doctrine not only of water law but statutory construction: where parts of a statute are in conflict, the courts will give effect to the primary purpose of the legislation disregarding those elements which would prevent its accomplishment.

A clear example of the illusory protection afforded by H.R. 1010 lies in the alleged ability of the permitting State to curtail water to an operating pipeline. If Wyoming, for example, determined that it was necessary for legitimate conservation purposes to curtail the water rights of an operating interstate coal pipeline, it is extremely unlikely that it would be able to do so, from either a practical or a legal standpoint, as Professor Corker testified. Assistant Attorney General Carol Dinkins agreed that the result would be speculative and "never a sure thing."

2. *The language of H.R. 1010 may ultimately provide no protection to the State of Origin since, according to expert testimony, it is likely to be found unconstitutional.*

Expert testimony in the record establishes tht State water laws cannot be adequately protected in legislation designed primarily to grant Federal eminent domain for coal slurry pipelines and promising the grant of Federal eminent domain on the congressional determination and finding that coal slurry pipelines constitute a beneficial public use. To delegate to a single State any exclusive authority over shared water ignores the interests and alters the existing rights of upstream States, downstream States, neighboring States sharing the water source, as well as the interests and rights

of States through which the water passes in the slurrey pipeline, and States receiving the coal slurry nd water effluent itself. In fact, Section 10(c) of H.R. 1010 expressly retracts from the intermediate and receiving States significant rights they possess today. Expert testimony before the Subcommittee suggested that it is beyond the power of Congress to make such a delegation. The constitutional problem is compounded when the delegation is effectively to a single State *and* a private entity, and when the diversion will be out of State.

According to the Surface Transportation Subcommittee testimony of Professor Corker, a noted authority on constitutional as well as water law, the most likely result of the certain challenges to this legislation is that the water provisions will be held unconstitutional for a number of reasons. Congress cannot delegate what it does not possess, and it may not authorize the extraterritorial extension of State law—which is precisely what Section 10 of H.R. 1010 would do. To say that the law of State A alone controls the export to State C of water shared with State B represents and extraterritorial application of the laws of State A and a denial of due process to States B and C. In addition, whatever Congress may do pursuant to its broad Commerce Clause powers remains subject to other constitutional provisions, notably the Privileges and Immunities Clauses of Article IV, Section 2 of the Fourteenth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as structural considerations that transcend particular clauses. All of the expert legal witnesses agreed that due process considerations alone could preclude a State from shutting off water to an operating pipeline unless it had, in fact, foreseen every possible future contingency. For example, the testimony of Gary Widman, a pro-slurry attorney, was that a State would have not right to cut off water in such circumstances "unless it had precisely described the circumstances."

UNSOUND PUBLIC POLICY

1. *H.R. 1010 improperly advantages water for a single use and thereby at best ignores and at worst seriously threatens other equally or more deserving uses of water.*

Agriculture, other industrial uses, domestic water supply, and in-stream environmental needs are certainly at least as worthy, but they do not have the special treatment afforded coal slurry pipelines. Because this legislation singles out only one use for preeminent water rights, it is clearly inequitable and improper.

It is especially disturbing that other water uses may have difficulty meeting needs, while coal slurry lines remain filled with this vitally needed water. Agriculture is already suffering from inadequate water supplies. To the extent coal slurry lines drain away dwindling sources of water, agriculture and other uses will be in even more jeopardy. Agricultural water uses are in danger in at least three ways. First, water diverted from a State will be unavailable to farmers within that State. Second, farmers in downstream States (or adjacent States in the case of joint aquifer systems) will be denied use of the water. Third, the cost of water will be made much greater given the willingness of coal slurry companies to

drive up the general price. One energy project in Utah, for example, offered about five times the going rate for water from the Sevier River ("Water: Will We Have Enough To Go Around", U.S. News and World Report, June 28, 1981).

2. *The negative impacts of the legislation will be felt most particularly in the West where surface water and groundwater are most scarce.*

Most active coal slurry proposals are in the West. This area of the country is the one most water-limited and the one least able to afford even a limited loss of any of its water. At the same time that the Ogallala Aquifer, for example, is declining, encouraging out-of-basin transfers reduces the options for the future in the Ogallala and other areas of the West. There are also severe potential impacts on the surface water/groundwater relationship. Groundwater supplies often supply surface water sources as noted in a recent GAO report (GAO Report CED 80-96, September 12, 1980, "Groundwater Overdrafting Must Be Controlled"). Also, surface waters can replenish groundwater. Diverting either will clearly reduce the supply to the other. The legislation ignores this important relationship as well as the constrained water supplies of the West.

3. *The legislation is contrary to the Nation's goals of conservation and sound water management.*

Current policy in the natural resources area, particularly for water resources, focuses on conservation as a key method of controlling demand. The coal slurry legislation encourages use of a State's waters for coal pipelines and provides the State with powers which it has for no other water use. Given the fiscal and financial difficulties facing so many States, their desire to conserve limited water resources will be overpowered by the financial benefit of selling water for coal slurry uses. It will be difficult to enforce conservation in other water use areas while coal slurry pipelines are given all they need.

It is ironic that the so-called energy program of coal slurry pipelines may lead to increases in energy needs. These energy needs will come not only for the pumps on the pipelines themselves, but for pumping depleted water supplies further. GAO reported (GAO Report CED 80-96, September 12, 1980, "Ground Water Overdrafting Must Be Controlled") an increase of energy requirements by more than four times in part of the San Joaquin Valley of California due to groundwater depletion.

All the recent articles on water shortage, both in media and in professional journals, call for balanced management of water to meet all uses. H.R. 1010 policy flies in the face of this. In fact, by encouraging diversion of water for a single use, the alternatives for wise water management are constrained. This limitation on the flexibility needed to manage a finite resource clearly promotes unacceptable public policy.

4. *H.R. 1010 creates a dangerous precedent in the water transfer area that will pit State against State while limiting remedies.*

The recently completed studies of the Ogallala Aquifer Regional Study (submitted December 13, 1982 by the High Plains Study Council) have shown the extent of the need for water in the six-State region studied. Although conservation and dry land farming

are discussed as alternatives, there is significant emphasis on diversion of water to this area to meet its needs. Despite strong opposition to such diversions from downstream States, legislation patterned on the policy of H.R. 1010 could leave these States without recourse if other States divert water to the High Plains area. The same situation holds true regarding coal slurry water in H.R. 1010 from the Great Lakes region. Under the legislation, any State may be able to divert water from the Great Lakes Basin without any recourse by other Great Lakes States. As the June 1982 MacKinac Island Conference detailed, even limited reductions in total Great Lakes water could have disastrous consequences for the region. The legislation will probably not only fail to protect the Great Lakes, it will encourage diversion from the basin for coal slurry pipelines.

This dangerous precedent could well lead to attempts to divert even larger volumes of water for other purposes. By signalling Congressional acquiescence to forgo any Federal interest (by delegating all Commerce Clause rights to States) and ignoring needs of downstream States, other interests, be they industrial, agricultural, or municipal, could seek similar rights for their purposes. If given such rights (on the basis of equitable treatment), the Nation's water supplies would be placed on the auction block and downstream or adjacent States would be left high and dry, literally.

All in all, the bill pits States against each other. The legislation creates bad policy because it permits and encourages States to divert flow from basins for coal slurry pipelines, notwithstanding the legitimate needs of downstream or neighboring States. This is likely to lead to dangerous competition between States as they vie for use of water and revenues from coal slurry sales. Those States left out of the deals are not likely to be willing to cooperate on the myriad other concerns of the various areas of the Nation.

5. *The bill directly contravenes, for no persuasive reason, the long-standing Congressional policy that free interbasin transferability of water would be detrimental to the State interests.*

In the Boulder Canyon Project Act of 1928, which established the Colorado River Compact, Congress apportioned the lower Colorado River for use in perpetuity within basins and within States. Water was not treated as, nor was it intended to be, an item transferrable across basin lines or State boundary lines. More recently, this policy was reflected in the Colorado River Basin Project Act of 1968. That Act, which "provide(s) a program for further comprehensive development of the water resources for the Colorado River Basin * * *", prohibited the Secretary of Interior from undertaking any study of importation into the basin for a period of ten years. This provision was extended only a few years ago, in 1978, by unanimous vote of Congress for another ten years (92 Stat. 2472), and in 1980 the provision was extended to preclude all Federal officials from acting because such diversions were said to constitute a threat to the "orderly development of remaining resources" in other basins.

No persuasive argument exists to depart from this long-standing and wise policy. Yet in H.R. 1010 the Congress is fostering creation of the coal slurry industry and a new, commercial high-volume use of scarce water by an industry dependent on interbasin transfer of water.

Every reason exists not to depart from our current policy. Perhaps one of the best and most persuasive is seen in the comments of Mr. Gary Widman during his testimony this year at coal slurry hearings held by our Subcommttee on Surface Transportation. Mr. Widman, a local attorney whose "clients include supporters of coal slurry pipelines," testified in support of the bill and in support of its water language. After mentioning that the lower basin of the Colorado River—and perhaps the Colorado River as a whole—is or will soon be over-appropriated and the "ominous Ogallala formation declines in Texas, New Mexico and neighboring States," Mr. Widman concluded his written statement with the following comment:

> I would like to suggest that it is now incumbent upon this Congress to view water issues involving "States rights" and State control over water exports against the background of this serious regional water resource problem. *Ultimately, only the massive movement of water, or of people, will solve these problems.* (Emphasis added.)

Far more than cheaper coal is at stake in this coal slurry bill. H.R. 1010 could provide the first step of many down the long and previously-forbidden road of Congressionl sanctioning and control over interbasin transfers of our nation's precious water resources.

GENE SNYDER.
JAMES L. OBERSTAR.
JOHN PAUL HAMMERSCHMIDT.
HENRY J. NOWAK.
BUD SHUSTER.
BOB EDGAR.
ARLAN STANGELAND.
NICK RAHALL.
GUY V. MOLINARI.
DOUG APPLEGATE.
BOB MCEWEN.
KATIE HALL.
HAL DAUB.
JOE KOLTER.
LYNN MARTIN.
WILLIAM O. LIPINSKI.
J. ROY ROWLAND.
BOB WISE.

ADDITIONAL DISSENTING VIEWS OF CONGRESSMAN JOHN PAUL HAMMERSCHMIDT

My primary objection to H.R. 1010 is the water issue.

Perhaps the most serious and fundamental shortcoming of H.R. 1010, as reported by both the Public Works and Interior Committees, is the bill's language relating to State water law. Because of this situation, I cosponsored an amendment in Subcommittee and again in full Committee to help rectify the problems attaching to this language. The amendment failed in Subcommittee by a 14 to 15 vote and in full Committee by a 22 to 28 vote.

The United States Supreme Court, in a major decision announced less than a year ago (*Sporhase* v. *Nebraska*), declared a Nebraska groundwater export statute to be an undue burden on interstate commerce and, therefore, unconstitutional. The proponents of Federal coal slurry legislation have reacted to this situation by including language in H.R. 1010 which, among other things, purports to delegate to any State supplying water for an interstate coal slurry pipeline (i.e., the *State of Origin*) all of Congress' power under the Commerce Clause of the U.S. Constitution:

> . . . to establish and exercise in State law, whether now in existence or hereafter enacted . . . for the reservation, appropriation, use, export, or diversion of or other claim to, or exercise of any right in, water for a coal pipeline, nowthwithstanding any otherwise impermissible burden which may thereby be imposed on interstate commerce.

This coal slurry bill has been characterized by some as "nothing more than a simple, little right-of-way bill". I don't want to argue the merits of that statement as it relates to non-water issues and neither do I want to argue its merits with respect to water issues prior to the Supreme Court's *Sporhase* decision. But I am convinced that, since *Sporhase,* this statement is clearly *not true* concerning State decision-making related to water for coal slurry use.

The *Sporhase* decision, however broad or narrow its scope, has cast significant doubt on the ability of the States to protect their water resources particularly in terms of a State's ability to prohibit or condition use of its waters for coal slurry pipelines. The water language of the reported bill is intended, among other things, to have the effect of overruling *Sporhase,* at least as its holding might be found to apply to the use of water in an interstate coal slurry pipeline. This is accomplished under the bill's language as mentioned above, by attempting to grant to the State or Origin all of Congress' power under the Commerce Clause of the Constitution to legislate with respect to the use of water for coal slurry pipelines, even when such a State's action—using this extraordinary Congressional grant of power—would otherwise constitute an impermissible burden on interstate commerce. This is an extremely important

point! With the bill's water language, Congress is authorizing a State to do more in terms of water regulation than that State would be able to do without the extraordinary powers being granted in this bill.

In the water area, therefore, we are dealing with far more than "just a simple right-of-way bill."

I and a number of others are seriously concerned that the bills' current unamended language places downstream States (in the case of interstate surface waters) and adjacent sharing States (in the case of multi-State underground aquifers) at an enormous and potentially fatal disadvantage in terms of attempting to protect their water-related interests against those of any State of Origin wielding the Commerce Clause powers being delegated in the coal slurry bills. States contesting the loss of their shared waters to diversion occurring in another State would be forced to rely on "existing mechanisms which permit the State to seek legislative, judicial and compact allocations," according to the Interior Committee report. By contrast, States choosing to sell shared water would be armed with the extraordinary grant of Congress' plenary power over water for slurry pipelines.

Even the Interior Committee report concedes that there are valid grounds for concern among States other than those in which the diversion occurs, and concedes the possible need for future action by Congress. The Interior Committee report states:

> The Committee also notes the substantial concern expressed by Members of Congress and others about the possible effects the broad authority delegated to States to control water for coal pipelines may have on the water resources of other States not the origin or such water. *The Committee believes the concerns over allocation of interstate waters, such as certain groundwater aquifers, are understandable and it believes these concerns should receive attention from Congress in the future, as circumstances require.* (Emphasis added.)

I believe that, if Congress is going to give to any State the right to use all of Congress' Commerce Clause powers to regulate the availability and use of a particular source of water with respect to a coal slurry pipeline, we had better also make sure that we are at the same time affording a proper level of protection to any other State or States which might be adversely affected by the decisions of the first State. It's this situation that the Shared Water Amendment was designed to address and it's this proper level of protection that the amendment was designed to provide.

Perhaps an example would help to illustrate the situation. Picture three adjacent arid States—A, B, and C—in a line from left to right. Under States A and B lies a groundwater aquifer from which both States draw their drinking water. State B wants to ship coal in a slurry pipeline to State C, using water drawn from the aquifer underlying A and B. The water language of H.R. 1010 purports to give State B all of Congress' Commerce Clause power to effectuate State B's purposes. Shouldn't State A also be ensured of a comparable countervailing right in order to allow it to protect its own legitimate interests? I think that the answer is clear, that it should

be placed on an equal footing with State B in advancing its interests. That's all the Shared Water Amendment was and is intended to do, using the tried-and-true mechanism of the interstate compact.

The Shared Water Amendment gives necessary protection to a State or States whose legitimate interests might be adversely affected by another State's selfish or improper use of the extraordinary Congressional powers being delegated in the coal slurry bill. The amendment provides that:

> No State may divert shared water for a certificated pipeline unless there is an interstate compact governing such shared waters and the States which are party to the compact consent to the diversion.
>
> Shared waters covered by the amendment include: (1) interstate surface waters, such as rivers (e.g., the Missouri River) or lakes (e.g., the Great Lakes); and (2) groundwater aquifers underlying more than one State (e.g., the Ogallala Aquifer).

I believe that the Shared Water Amendment is an appropriate and feasible method for dealing with this situation. Interstate compacts are a tried-and-true mechanism for working out multi-State water problems. They have been a workable and successful instrument for cooperation for an increasing number of purposes by an increasing number of States, and they are especially well-suited to address and resolve the kinds of water-related problems that are likely to be created by enactment of coal slurry legislation.

Some have reacted to the amendment with the allegation that it is a killer amendment, one which must be opposed by supporters of the bill on a whole. The argument has been made that it is totally unworkable because "18 or 20 States" would be required to reach agreement before a pipeline could be approved.

In the first place, the Shared Water is *not* a killer amendment, either in intent or effect. It is narrowly drawn to apply only to interstate water in coal slurry pipeline certificated under this bill. It does not, for example, apply to pipelines having water coming from a basin or a stream totally within a State. Neither does it apply to a pipeline that is not attempting to use the power of Federal eminent domain being granted in this bill. If a pipeline does not need or does not use Federal eminent domain powers being granted in this legislation, it is not covered by the amendment.

Secondly, there is no situation of which I am aware requiring anywhere near 18 or 20 States to be part of a compact. The table below summarizes, for each major river and aquifer system in the country, the maximum number of States which could conceivably be found to fall under the amendment's coverage, depending on which river or aquifer was the source of the coal slurry water. As the table indicates, the worst case situation, the Mississippi River, involves no more than ten States.

Major river basins/aquifers and States primarily associated with them

	States
River basins:	
Columbia (6)	Oregon, Washington, Idaho, Montana, Wyoming, Nevada.
Colorado (7)	Wyoming, Colorado, Utah, Arizona, New Mexico, Nevada, California.
Missouri (9)	Montana, North Dakota, South Dakota, Wyoming, Nebraska, Colorado, Iowa, Kansas, Missouri.
Arkansas White/Red (7)	Colorado, Kansas, Oklahoma, New Mexico, Arkansas, Texas, Missouri.
Mississippi (10)	Minnesota, Wisconsin, Iowa, Illinois, Missouri, Arkansas, Louisiana, Mississippi, Tennessee, Indiana.
Ohio (8)	Indiana, Ohio, Pennsylvania, West Virginia, Kentucky, Tennessee, Virginia.
Delaware (4)	New York, Pennsylvania, New Jersey, Delaware.
Potomac (4)	West Virginia, Virginia, Pennsylvania, Maryland.
Great Lakes (8)	Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, New York.
Aquifers and aquifer systems:	
Columbia Plateau (3)	Oregon, Washington, Idaho.
Ogallala (High Plains) (8)	Texas, New Mexico, Colorado, Oklahoma, Nebraska, South Dakota, Kansas, Wyoming.
Central Midwest (8)	Colorado, Wyoming, Nebraska, Kansas, Oklahoma, Arkansas, Missouri, New Mexico.
North Great Plains (5)	North Dakota, South Dakota, Montana, Wyoming, Minnesota.
Northern Midwest (6)	Iowa, Minnesota, Wisconsin, Illinois, Missouri, Indiana.
West Gulf Coastal Plain (6)	Texas, Louisiana, Arkansas, Tennessee, Kentucky, Mississippi.
Atlantic Coastal Plain (7)	New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina.
Southeastern Coastal Plain (4).	South Carolina, Georgia, Alabama, Mississippi.

It has been argued that the amendment should be opposed because its approach is not found in other Federal statutes and is a radical and unwarranted Federal intrusion into each State's power to control its share of interstate waters. Such an argument, however, fails to recognize at the outset that, if anything represents a "radical and unwarranted intrusion into each State's power to control its share of interstate water," it is this bill which gives the plenary power of the Congress under the Commerce Clause of the Constitution to the State of Origin. Furthermore, by affirmatively promoting interbasin transfer of water on a large scale for the first time in history, H.R. 1010 can itself be honestly characterized as a radical measure. Thus, it is the very radical nature of the bill's language which itself creates the need for the Shared Water Amendment.

Opponents of the amendment also allege that the amendment is unnecessary because, under existing law, each State is adequately protected by the Supreme Court doctrine of equitable allocation, by voluntary interstate compacts, or by legislative allocation, all of which are conveniently lumped together in the term "traditional mechanisms". This allegation misses the mark; the amendment is necessary for two reasons, both of which originate with H.R. 1010

itself. First, the Federal government, by actively fostering coal slurry pipelines, is itself creating the demand for diversion of shared water. Second, the extraordinary affirmative powers over water which the bill grants to a State seeking to export water for coal slurry pipelines places at a fatal disadvantage those States which seek use of "traditional mechanisms" to assert their interest in shared water. In effect, the opponents of this measure are telling the aggrieved State to go to court to assert its shared-water interests. But when it gets there, it will find that, unlike a dispute in which two States have equal standing, the State diverting the water has been armed with special Congressional powers.

Finally, the Shared Water Amendment has been attacked as calling for a departure from traditional methods of resolving interstate water conflicts solely because of a general dislike for coal slurry pipelines. Such a charge reflects a mistaken understanding of the nature of the concerns that have prompted this amendment. It isn't a matter of just not liking coal slurry pipelines. As has been pointed out already, the problem the amendment is designed to address is a problem that goes to the heart of our Federal system under the Constitution: keeping States in an equitable and roughly equivalent position in terms of protecting their legitimate States interests.

The Shared Water Amendment is a good amendment, one that should be embraced by anyone who values the crucial importance of water and strong yet balanced States' rights.

JOHN PAUL HAMMERSCHMIDT.

ADDITIONAL DISSENTING VIEWS OF HAL DAUB

The coal slurry pipeline legislation recently approved by the House Public Works Committee is of considerate concern to me as it should be to every Member who has an interest in the future of our country.

There were a number of problems with the legislation that were addressed by the Committee and while I felt that the majority understood the ramifications of the their actions in most cases I do not believe that many Members appreciate the consequence of approving this legislation without addressing the all-important water issue.

In the May 6, 1982 GAO report entitled, *Water Issues Facing the Nation,* The report stated, "Many experts predict that a water supply crisis potentially more serious than the energy crisis looms in the country's future. The crisis, should it occur, would not be the result of inadequate quantities of water, for as a nation we have an abundant supply. It would be the result of poor management of this resource." "To meet the Nation's water needs, effective planning must be carried out at all government levels, supplies must be made available where and when they are needed." The report continues, "unfortunately political boundaries do not coincide with natural river basin boundaries. The Congress, recognizing the rights of States to manage their own water and need for coordination among the States, passed the Water Resources Management Act of 1965 to encourage comprehensive regional planning. The act also established the Water Resources Council to coordinate water management nationwide. This effort, however, has been largely ineffective because the Council and the regional planning bodies had neither the level of responsibility nor authority necessary to enforce their planning decisions."

Further the report states, "The Federal Government has a tremendous stake in ensuring that no part of the country runs out of water." "It seems certain that, in the future, greater emphasis will be placed on managing our existing water supplies more effectively. Now is the time to take action. If the Nation waits until the shortage reaches crisis proportions, the remedies are likely to be stopgap in nature and too late to be of real benefit."

In spite of this warning the Congress appears ready to undertake a process that will result in massive quantities of water from one of the most important and precarious sources in the Nation being used to ship coal through pipelines. I agree that as a nation we should emphasize both the domestic use and export of coal. I agree that pipelines provide safe, reliable and inexprensive transportation. But I cannot countenance a process that puts the prospect of these advantages over the possibility of endangering out water supply.

For those of us in the Plains States water is not something we take for granted. It makes our region the breadbasket for the rest of the Nation and allows us to use land that would otherwise be unsuitable for agricultural purposes. It is unfortunate today and possibly disastrous tomorrow but we appear ready to sacrifice the agricultural foundation of our country in order to expedite the shipment of coal.

At the very least I would believe prudent that the Congress address itself to the water question more seriously than it has so far. The water amendment offered by Mr. Edgar and Mr. Hammerschmidt was not a delaying tactic whose purpose was to sidetrack this legislation but instead an acknowledgement of a real concern. The fact that water today may not be our number one problem of that the issue is complicated and not given to ideological or other easy analysis does not mean that Congress can ignore it. It is altogether conceivable that we could face a crisis in agriculture as a result of ignoring water policy that could make our energy problems appear insignificant.

The water of the Western States is not an issue confined to tales of the West or a "supply" problem of the farmer similar to "supply" problems other businessmen face. Water policy decided today will determine tomorrow what price Americans will pay for food and how much of it is available. It will determine whether or not agriculture can continue to almost single-handedly balance America's trade deficit.

It is unfortunate that the Congress cannot see fit to deal with this matter in the manner it requires. The fact that it plays a minor side role in the determination of whether or not it is prudent to construct coal slurry lines is something that all of us will regret someday.

I urge my colleagues in the House pay attention to what is being said in all quarters about our Nation's water supply and to pay heed to what this means. In the determination of coal slurry legislation water sould have played a more important role than it did. I hope for everyone's sake that we begin to acknowledge this importance soon and not continue to view it as a regional or temporary concern.

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